Supreme Court, U.S.
FILED

97 • 346 AUG 20 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

J. P. Nadeau
Nadeau Prof. Office
507 State St.
Portsmouth, NH 03801
(603) 436-0110

August 20, 1997

51 pp

QUESTION PRESENTED

Does a condition of probation providing that a probation officer can conduct searches with no individualized suspicion violate the Fourth Amendment's guarantee against unreasonable searches?

PARTIES TO THE PROCEEDING

Zeta Chi Fraternity is a fraternal organization incorporated in the State of New Hampshire. Zeta Chi Fraternity has no parent or subsidiary corporations.

As this was a criminal proceeding, the State of New Hampshire was the prosecuting party.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

REPORT OF OPINION 1

JURISDICTION 2

CONSTITUTIONAL PROVISION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. Decisions of Various Federal Circuit Courts Differ with the United States Supreme Court, and the Various Federal Circuit Courts Differ Among Themselves 5

II. The Decision of the New Hampshire Supreme Court Differs with a Decision of the United States Supreme Court and with a Decision of the 1st Circuit Court of Appeals 7

III. Decisions of the Highest Courts in Various States Differ from the Decisions of the Highest Courts in Various Other States 8

IV. The Question Presented is Important to Criminal Courts Throughout the Country 11

CONCLUSION 11

TABLE OF AUTHORITIES

FEDERAL CASES

Griffin v. Wisconsin,
483 U.S. 868, 871 (1987) 3,5,6,7,10,11

Jones v. Murray,
962 F.2d 302 (4th Cir.) 5

Morrisey v. Brewer,
408 U.S. 471 (1972) 11

Owens v. Kelley,
681 F.2d 1362 (11th Cir. 1982) 5

United States v. Coleman,
22 F.3d 126 (7th Cir. 1994) 6

United States v. Consuelo-Gonzalez,
521 F.2d 259 (9th Cir. 1975) 6

United States v. Dally,
606 F.2d 861 (9th Cir. 1979) 6

United States v. Davis,
932 F.2d 752 (9th Cir. 1991) 5, 6

United States v. Giannetta,
909 F.2d 571 (1st Cir. 1990) 5, 6, 7

United States v. Gordon,
540 F.2d 452 (9th Cir. 1976) 6

United States v. Harper,
928 F.2d 894 (9th Cir. 1991) 6

United States v. Hill,
967 F.2d 902 (3d Cir. 1992) 6

United States v. Jeffers,
573 F.2d 1074 (9th Cir. 1978) 6

United States v. Johnson,
722 F.2d 525, 527 (9th Cir. 1983) 6

United States v. Martin,
25 F.3d 293 (6th Cir. 1994) 6

United States v. McCarty,
82 F.3d 943 (10th Cir. 1996) 6

United States v. Schoenrock,
868 F.2d 289 (8th Cir. 1989) 5,6

United States v. Scott,
945 F. Supp. 205 (D.S.D. 1996) 5

United States v. Watts,
67 F.3d 790 (9th Cir. 1995) 6

STATE CASES

Allen v. State,
369 S.E.2d 909 (Ga. 1988) 9

Basaldua v. State,
558 S.W.2d 2 (Tex. Crim. App. 1977) 8

Commonwealth v. LaFrance,
525 N.E.2d 379, 380 (Mass. 1988) 5,7,10

Commonwealth v. Williams,
692 A.2d 1031 (Pa. 1997) 4,10

Dearth v. State,
390 So. 2d 108 (Fla. App. 1980) 8

Grubbs v. State,
373 So. 2d 905, 910 (Fla. 1979) 8

Idaho v. Pincon,
657 P.2d 1095 (Idaho Ct. App. 1983) 9

Isaacs v. State,
351 So. 2d 359 (Fla. App. 1977) 8

Kirkpatrick v. State,
412 So. 2d 903, (Fla. App. 1982) 8

Luke v. State,
344 S.E.2d 452 (Ga. 1986) 9

Milton v. State,
879 P.2d 1031 (Alaska 1994) 8

Pace v. State,
335 So. 2d 11 (Fla. App. 1976) 8

Pace v. State,
350 So. 2d 1075 (Fla. App. 1977) 8

People v. Anderson,
536 P.2d 302 (Colo. 1975) 10

People v. Braun,
578 N.Y.S.2d 2 (App. Div. 1991) 8

People v. Bravo,
738 P.2d 336 (Cal.) 9

People v. Eiland,
576 N.E.2d 1185 (Ill. App. 1991) 10

People v. Fortunato,
376 N.Y.S.2d 723(App. Div. 1975) 8

People v. Hellenthal,
465 N.W.2d 329 (Mich. 1990) 9

People v. Mason,
488 P.2d 630 (Cal.) 9

People v. Peterson,
233 N.W.2d 250 (Mich. 1975) 9

People v. Suttell,
492 N.Y.S.2d 192 (App. Div. 1985) 8

People v. Sztuk,
511 N.Y.S.2d 720 (App. Div. 1987) 8

Police v. Lilienthal,
587 P.2d 706 (Cal. 1978) 9

Roman v. State,
570 P.2d 1235 (Alaska 1977) 9

Sanders v. State,
351 So. 2d 361 (Fla. App. 1977) 8

Seim v. State,
590 P.2d 1152 (Nev. 1979) 10

State of New Hampshire v. Zeta Chi Fraternity,
_ N.H. _, _ A.2d _ (1997) 1,3,7,9

State v. Age,
590 P.2d 759 (Or. App. 1979) 9

State v. Bernier,
486 A.2d 147 (Me. 1985) 9

State v. Bollinger,
405 A.2d 432, 438 (N.J. Super. Ct. App. Div. 1979) .. 9

State v. Burchett,
921 P.2d 854 (Mont. 1996) 10

State v. Burke,
766 P.2d 254, 256 (Mont. 1988) 10

State v. Collins,
681 A.2d 1168 (Me. 1996) 9

State v. Culbertson,
563 P.2d 1224 (Or. App. 1977) 10

State v. Cummings,
262 N.W.2d 56, 61 (S.D. 1978) 10

State v. Davis,
891 P.2d 1373 (Or. App. 1995) 9

State v. Fields,
686 P.2d 1379, 1389 (Haw. 1984) 10

State v. Finnegan,
439 N.W.2d 496(Neb. 1989) 10

State v. Fisher,
574 P.2d 354(Or. App. 1978) 9

State v. Fogarty,
610 P.2d 140, 150 (Mont. 1980) 10

State v. Gallagher,
675 P.2d 429 (N.M. Ct. App. 1984) 9

State v. Goettel,
572 P.2d 115 (Ariz. Ct. App. 1977) 9

State v. Grant,
252 S.E.2d 98 (N.C. 1979) 9

State v. Jeffers,
568 P.2d 1090 (Ariz. 1977) 9

State v. Josephson,
867 P.2d 993 (Idaho Ct. App. 1993) 9

State v. Lucas,
783 P.2d 121 (Wash. App. 1989) 10

State v. Martinez,
811 P.2d 205, 209 (Utah App. 1991) 10

State v. Mitchell,
207 S.E.2d 263 (N.C. 1974) 9

State v. Montgomery,
566 P.2d 1329, 1331 (Ariz. 1977) 9

State v. Moore,
247 S.E.2d 250 (N.C. 1978) 9

State v. Morgan,
295 N.W.2d 285 (Neb. 1980) 4,10

State v. Patterson,
752 P.2d 945 (Wash. App. 1988) 10

State v. Perbix,
331 N.W.2d 14 (N.D. 1983) 4,9

State v. Schlosser,
202 N.W.2d 136 (N.D. 1972) 9

State v. Sievers,
511 N.W.2d 205 (Neb. 1994) 10

State v. Turner,
688 P.2d 1030 (Ariz. Ct. App. 1984) 9

State v. White,
142 S.E.2d 153 (N.C. 1965) 9

Tamez v. State,
534 S.W.2d 686 (Tex. Crim. App. 1976) 8

Wilson v. State,
752 S.W.2d 46 (Ark. 1988) 10

STATUTES

28 U.S.C. § 1257(a) (1988) 2

NO. ___

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Zeta Chi Fraternity respectfully petitions for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case.

REPORT OF OPINION BELOW

On May 22, 1997, the New Hampshire Supreme Court rendered an opinion in this case. *State of New Hampshire v. Zeta Chi Fraternity*, __ N.H. __, __ A.2d __ (1997). It is reprinted in the Appendix hereto. The issues for which the petitioner requests certiorari are contained in section III of the opinion and in the dissent, and relevant facts are stated throughout.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION

The United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Zeta Chi Fraternity is a fraternal organization on the campus of the University of New Hampshire in Durham, New Hampshire. As with most fraternities, it holds an annual "rush" to attract new members.

In February 1994, to attract people to its rush, Zeta Chi invited two female strippers to dance. Some of those attending the rush gave the strippers money. Toward the end of the evening, an act of oral sex was performed on one of the women. After a jury found the fraternity guilty of prostitution, the New Hampshire Supreme Court affirmed the conviction.

In addition, the fraternity had decided not to provide alcoholic beverages to its guests. But the New Hampshire Supreme Court found that because there was a vending machine containing cans of beer accessible to those attending, including those younger than the state's drinking age, that the fraternity had control over the premises, and that an underage person bought beer, the fraternity was guilty of illegal sale of alcohol.

The fraternity's sentence included, among other things, a prohibition against alcoholic beverages on its premises, and a term of probation, which is administered in New Hampshire by the Department of Corrections. In addition, the sentence contained the condition that:

> the defendant's premises shall be subject to unannounced searches by the Department of Corrections . . . to determine compliance with . . . any condition of probation.[1]

State v. Zeta Chi Fraternity, Appendix at 13.

The defendant argued that because the probation condition authorized searches without any need for an individualized belief that contraband existed on the defendant's premises, the search condition violated the Fourteenth Amendment to the United States Constitution. The defendant's argument was based on *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987), which requires "reasonable grounds" to search a probationer's premises. The New Hampshire Supreme Court, however, over a reasoned dissent, found that:

> when a condition of probation authorizes random warrantless searches and the condition is reasonably related to the supervision and rehabilitation of the probationer, a warrantless probation search is constitutionally permissible.

State v. Zeta Chi Fraternity, Appendix at 17, (citing *Griffin v. Wisconsin*, 483 U.S. at 880).

---

[1]The sentence initially authorized searches by the police as well, but the New Hampshire Supreme Court ruled the search condition is enforceable by the Department of Corrections only. *State v. Zeta Chi Fraternity*, Appendix at 21.

REASONS FOR GRANTING WRIT

The law is unsettled regarding whether a warrantless search of a probationer pursuant to a condition of probation requires individualized cause to believe the probationer is violating probation. *See, e.g., State v. Perbix*, 331 N.W.2d 14, 19 (N.D. 1983), *later app.*, 349 N.W.2d 403 (1984) ("respectable and well-reasoned authorities have reached contrary results concerning the constitutional validity and application of search provisions" imposed on probationers); *State v. Morgan*, 295 N.W.2d 285, 287 (Neb. 1980) ("respectable and well-reasoned authorities exist on both sides of the question").

The cases, decided in numerous jurisdictions, fall into three general categories. Some courts have found that probation search conditions are facially invalid. On the other extreme, some courts have found that search conditions are either a valid prior consent to search, or that probationers' diminished Fourth Amendment rights do not protect them against searches by their probation officers.

Many jurisdictions have chosen a "middle ground approach." *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997). They have found that while probationers enjoy less Fourth Amendment protection than other citizens, or that Fourth Amendment rights are waived by accepting terms of probation, the search must be based upon some individualized grounds for believing that the probationer is in violation of probation. These courts differ among themselves in the measure of cause required to trigger a warrantless search. Some courts forbid a search without full probable cause, while others allow a search to go forward based on a reasonable suspicion, reasonable grounds, a likelihood, a well-founded suspicion, or some other similar formulation.

Most courts that have reached this middle ground in the last

few years have assumed that the question is settled by *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). *See, e.g., United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990); *United States v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989) ("*Griffin* stands for the proposition that reasonableness for probationary searches may be established by statute, rather than by warrant."); *United States v. Scott*, 945 F. Supp. 205 (D.S.D. 1996). In *Griffin*, this Court held that a search condition imposed on all probationers by state regulation was valid provided that the search is based upon reasonable suspicion that it might produce evidence of a probation violation. In *Commonwealth v. LaFrance*, 525 N.E.2d 379, 380 (Mass. 1988), the Massachusetts Supreme Judicial Court found that *Griffin* holds:

> "[T]he Fourth Amendment to the constitution of the United States forbids the search of a probationer or her premises unless the probation officer has at least a reasonable suspicion that a search might produce evidence of a wrongdoing."

I. Decisions of Various Federal Circuit Courts Differ with the United States Supreme Court, and the Various Federal Circuit Courts Differ Among Themselves

No Circuit Court has held that a probation search condition is facially invalid.

The 11th Circuit expressly rejected the need for particularized suspicion to search a probationer. *Owens v. Kelley*, 681 F.2d 1362 (11th Cir. 1982), *reh'g. denied*, 697 F.2d 1094 (1983). The 4th Circuit has found that no individualized suspicion is required for a state program requiring convicted felons to yield a blood sample, *Jones v. Murray*, 962 F.2d 302 (4th Cir.), *cert. denied*, 506 U.S. 977 (1992), thus indicating that

it might find similarly in the probation context.

Seven Circuits have taken the middle-ground position set out in *Griffin* and found that probation searches require some level of individualized cause. *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990) (requiring reasonable suspicion, based on *Griffin*); *United States v. Hill*, 967 F.2d 902 (3d Cir. 1992) (parole case, requiring reasonable suspicion, based on *Griffin*); *United States v. Martin*, 25 F.3d 293 (6th Cir. 1994) (search held valid in light of substantial showing of individualized suspicion); *United States v. Coleman*, 22 F.3d 126 (7th Cir. 1994) (case from Wisconsin, directly controlled by *Griffin*); *United States v. Schoenrock*, 868 F.2d 289 (8th Cir. 1989) (requiring reasonable suspicion, based on *Griffin*) (*but c.f., United States v Sharp*, 931 F.2d 1310 (8th Cir. 1991) (upholding search without discussion of particularized suspicion)); *United States v. McCarty*, 82 F.3d 943 (10th Cir. 1996). The 9th Circuit first decided the issue in 1975 and has reaffirmed its position several times. *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir. 1975) (requiring "reasonable belief"); *United States v. Gordon*, 540 F.2d 452 (9th Cir. 1976); *United States v. Jeffers*, 573 F.2d 1074 (9th Cir. 1978); *United States v. Dally*, 606 F.2d 861 (9th Cir. 1979); *United States v. Johnson*, 722 F.2d 525, 527 (9th Cir. 1983) (there must be some conduct reasonably suggestive of criminal activity to trigger the search); *United States v. Harper*, 928 F.2d 894 (9th Cir. 1991) (requiring probable cause); *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Watts*, 67 F.3d 790 (9th Cir. 1995) (not resolving level of suspicion required to allow warrantless search), *reh'g denied*, 79 F.3d 768, *cert. denied*, 116 S. Ct. 1369 (1996).

It is thus apparent that the circuit courts differ on the issue, and that some differ with this Court's holding in *Griffin*. Accordingly, this Court should grant certiorari.

II. The Decision of the New Hampshire Supreme Court Differs with a Decision of the United States Supreme Court and with a Decision of the 1st Circuit Court of Appeals

Griffin held that the Fourth Amendment requires a probation officer have a reasonable suspicion that a search might produce evidence of a probation violation. *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987); *Commonwealth v. LaFrance*, 525 N.E.2d 379, 380 (Mass. 1988).

The 1st Circuit seconded *Griffin*'s holding. In *United States v. Giannetta*, 909 F.2d 571 (1st Cir. 1990), the court held that, based on *Griffin*, reasonable suspicion was necessary to carry out a search based on a condition of probation.

The New Hampshire Supreme Court, however, in its decision below held that:

> "[I]n order for a warrantless probation search condition to be constitutional it must be related to the rehabilitation or supervision of the defendant, and the search itself must be conducted in a manner that is reasonable in time, scope, and frequency."

State v. Zeta Chi Fraternity, Appendix at 20. The court rejected, however, the notion that there be any individualized suspicion. *Id.*, at 17. The New Hampshire court prescribed two reasonableness standards: 1) the connection between the search condition and the crime committed, and 2) the conduct of the search. However, *Griffin* mandates that the grounds upon which a search is based must also be reasonable. Thus, the New Hampshire court both misunderstands and mis-cites *Griffin*.

Because the decision of the New Hampshire Supreme Court differs with a decision of the United States Supreme Court, and with a decision of the 1st Circuit Court of Appeals, this Court should grant certiorari.

III. Decisions of the Highest Courts in Various States Differ from the Decisions of the Highest Courts in Various Other States

Three states have taken the position that a probation condition waiving Fourth Amendment rights is facially invalid. New York — *People v. Sztuk*, 511 N.Y.S.2d 720 (App. Div. 1987) ("It is improper to require a defendant to waive his constitutional rights against unlawful search as a condition of probation."); *People v. Braun*, 578 N.Y.S.2d 2 (App. Div. 1991); *see also People v. Suttell*, 492 N.Y.S.2d 192 (App. Div. 1985) (probation officer must get a prior judicial determination of reasonable cause); *but c.f.*, *People v. Fortunato*, 376 N.Y.S.2d 723(App. Div. 1975) (search upheld upon showing of cause);. Texas — *Basaldua v. State*, 558 S.W.2d 2 (Tex. Crim. App. 1977); *Tamez v. State*, 534 S.W.2d 686 (Tex. Crim. App. 1976). Florida[2] — *Kirkpatrick v. State*, 412 So. 2d 903, (Fla. App. 1982) (finding search condition facially invalid); *Dearth v. State*, 390 So. 2d 108 (Fla. App. 1980); *Grubbs v. State*, 373 So. 2d 905, 910 (Fla. 1979) ("probationary status may be used as a factor to establish probable cause"); *Isaacs v. State*, 351 So. 2d 359 (Fla. App. 1977); *Pace v. State*, 350 So. 2d 1075 (Fla. App. 1977); *Sanders v. State*, 351 So. 2d 361 (Fla. App. 1977); *Pace v. State*, 335 So. 2d 11 (Fla. App. 1976).

Fourteen states, including New Hampshire, have taken the other extreme and found that the probationer may either waive Fourth Amendment rights, or that the probation condition acts as a prior consent to search. Alaska — *Milton v. State*, 879 P.2d 1031 (Alaska 1994) (affirming *Roman* for probationers);

---

[2]Florida has wavered in its attitude toward the issue. The older and the most recent cases indicate distaste for probation search conditions, while the cases in between appear to countenance them upon a sufficient showing.

Roman v. State, 570 P.2d 1235 (Alaska 1977) (parolee search, no cause need be shown). Arizona — *State v. Jeffers*, 568 P.2d 1090 (Ariz. 1977); *State v. Montgomery*, 566 P.2d 1329, 1331 (Ariz. 1977); *State v. Turner*, 688 P.2d 1030 (Ariz. Ct. App. 1984); *State v. Goettel*, 572 P.2d 115 (Ariz. Ct. App. 1977). California — *People v. Bravo*, 738 P.2d 336 (Cal.), *cert. denied*, 485 U.S. 904 (1988) (expressly rejecting necessity for particularized suspicion); *Police v. Lilienthal*, 587 P.2d 706 (Cal. 1978); *People v. Mason*, 488 P.2d 630 (Cal.) (condition was valid prior consent), *cert. denied*, 405 U.S. 1016 (1971). Georgia — *Allen v. State*, 369 S.E.2d 909 (Ga. 1988); *Luke v. State*, 344 S.E.2d 452 (Ga. 1986). Idaho —; *State v. Josephson*, 867 P.2d 993 (Idaho Ct. App. 1993); *but c.f., Idaho v. Pincon*, 657 P.2d 1095 (Idaho Ct. App. 1983) (allowing search upon reasonable grounds). Maine — *State v. Collins*, 681 A.2d 1168 (Me. 1996); *State v. Bernier*, 486 A.2d 147 (Me. 1985) (validity of condition affirmed by equally divided court). Michigan — *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990) (explicitly overturning *Peterson*); *People v. Peterson*, 233 N.W.2d 250 (Mich. 1975) (pointing out that consent to waiver is coercive). New Hampshire — *State v. Zeta Chi Fraternity*, __ A.2d __ (N.H. 1997). New Jersey — *State v. Bollinger*, 405 A.2d 432, 438 (N.J. Super. Ct. App. Div. 1979). New Mexico — *State v. Gallagher*, 675 P.2d 429 (N.M. Ct. App. 1984). North Carolina — *State v. White*, 142 S.E.2d 153 (N.C. 1965); *State v. Mitchell*, 207 S.E.2d 263 (N.C. 1974) (valid waiver of Fourth Amendment rights); *State v. Moore*, 247 S.E.2d 250 (N.C. 1978); *State v. Grant*, 252 S.E.2d 98 (N.C. 1979) (search condition struck down, but change in policy brought about by statute). North Dakota — *State v. Perbix*, 331 N.W.2d 14 (N.D. 1983), *same case*, 349 N.W.2d 403; *State v. Schlosser*, 202 N.W.2d 136 (N.D. 1972). Oregon — *State v. Davis*, 891 P.2d 1373 (Or. App. 1995); *State v. Age*, 590 P.2d 759 (Or. App. 1979); *State v. Fisher*, 574 P.2d 354(Or. App.

1978); *State v. Culbertson*, 563 P.2d 1224 (Or. App. 1977). South Dakota — *State v. Cummings*, 262 N.W.2d 56, 61 (S.D. 1978).

Eleven states have taken the middle ground, as this Court took in *Griffin*, and have required that some measure of individualized suspicion is necessary before conducting a search pursuant to a probation condition. Arkansas — *Wilson v. State*, 752 S.W.2d 46 (Ark. 1988) (reasonable cause). Colorado — *People v. Anderson*, 536 P.2d 302 (Colo. 1975) (reasonable grounds). Hawaii — *State v. Fields*, 686 P.2d 1379, 1389 (Haw. 1984) (probation officer must "point to specific and articulable facts giving rise to a reasonable suspicion that [contraband] are concealed on the person, in the property, or at the place of residence of the probationer"). Illinois — *People v. Eiland*, 576 N.E.2d 1185 (Ill. App. 1991) (must be a likelihood that there will be contraband on premises, based on *Griffin*). Massachusetts — *Commonwealth v. La France*, 525 N.E.2d 379 (Mass. 1988) (reasonable suspicion, based on *Griffin)*. Montana — *State v. Burchett*, 921 P.2d 854 (Mont. 1996); *State v. Burke*, 766 P.2d 254, 256 (Mont. 1988) (reasonable cause); *State v. Fogarty*, 610 P.2d 140, 150 (Mont. 1980) (reasonable basis). Nebraska — *State v. Sievers*, 511 N.W.2d 205 (Neb. 1994); *State v. Finnegan* 439 N.W.2d 496(Neb. 1989); *State v. Morgan*, 295 N.W.2d 285 (Neb. 1980). Nevada — *Seim v. State*, 590 P.2d 1152 (Nev. 1979) (reasonable grounds). Pennsylvania — *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997) (parolee search, requiring reasonable suspicion). Utah — *State v. Martinez*, 811 P.2d 205, 209 (Utah App. 1991) (reasonable suspicion). Washington — *State v. Lucas*, 783 P.2d 121 (Wash. App. 1989) (well-founded suspicion), *review denied* 790 P.2d 167 (Wash. 1990); *State v. Patterson*, 752 P.2d 945 (Wash. App. 1988).

IV. The Question Presented is Important to Criminal Courts Throughout the Country

Probationers retain Fourth Amendment rights. *Morrisey v. Brewer*, 408 U.S. 471 (1972). Yet it is clear that their rights are not as great as other citizens. *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). The scope of probationers' rights touches each state and every criminal court in the country. As jails become more crowded, and courts look for non-incarceration methods to punish crime and curtail recidivism, probation and similar tools have become increasingly common. This Court should grant a writ of certiorari in this case to determine under what circumstances probationers' homes may be searched, and to settle this important and currently chaotic question of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully Submitted,

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

J. P. Nadeau
Nadeau Prof. Office
507 State St.
Portsmouth, NH 03801
(603) 436-0110

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.state.nh.us/courts/supreme.htm

THE SUPREME COURT OF NEW HAMPSHIRE

Strafford
No. 94-774

THE STATE OF NEW HAMPSHIRE

v.

ZETA CHI FRATERNITY

May 22, 1997

Jeffrey R. Howard, attorney general (John C. Kissinger, Jr., assistant attorney general, on the brief and orally), for the State.

Nadeau Professional Offices, of Portsmouth (James P. Nadeau on the brief), and Law Office of Joshua L. Gordon, of Concord (Joshua L. Gordon on the brief and orally), for the defendant.

HORTON, J. The defendant, Zeta Chi Fraternity, appeals

its convictions and sentence on the charges of selling alcohol to a person under the age of twenty-one, RSA 179:5 (1994) (amended 1996), and prostitution, RSA 645:2, I(e) (1996). The defendant argues that the evidence was not sufficient to support the convictions. The defendant also asserts that the Superior Court (Mohl, J.) erred in admitting into evidence the minutes of the defendant's meetings. Finally, the defendant challenges the constitutionality of its sentence for illegal sale of alcohol. We affirm the defendant's convictions butt vacate and remand for resentencing.

On February 21, 1994, the defendant, a New Hampshire corporation and fraternity at the University of New Hampshire in Durham, held a "rush" at its fraternity house to attract new members. In order to encourage people to attend the rush, the defendant hired two female strippers to perform at the event. Fraternity brothers encouraged guests to give the strippers dollar bills so that they would continue to perform. The brothers also told guests that the more money the strippers were given, the more that they would do. One of the members of the fraternity was providing change for larger bills. As part of the performance, the dancers lay on a mattress brought out by members of the fraternity and simulated oral sex on each other. At one point, a guest gave five dollars to one of the strippers who sat on the guest's lap. When a brother moved the dancer along, the guest complained that he had given five dollars. The stripper took the guest to the mattress and pushed his head into her crotch. Two witnesses testified at trial that they saw guests being led to the mattress after they gave money, at which point the guests then performed oral sex on the dancer.

In addition, Andrew Strachan, a nineteen-year-old guest at the fraternity party, testified that at some point during the evening he learned that beer was available from a soda machine.

He made his way to an apartment in another part of the fraternity house where the machine was located, waited in line with three or four other people, and purchased three to five cans of beer. Strachan also testified that he noticed someone making change for the machine. The fraternity's secretary testified that the fraternity members voted not to provide alcohol at the rush and that they moved the vending machine that contained beer to a separate apartment in another part of the fraternity house for the rush. He also testified, however, that the fraternity had control over the vending machine and its proceeds and that only fraternity members would have an interest in making change for the machine.

I. Sufficiency of Evidence

A. Illegal Sale of Alcohol

The defendant first argues the evidence was insufficient to convict it of selling alcohol to a person under the age of twenty-one. Specifically, the defendant contends that the testimony of the State's sole witness that he bought beer from the vending machine was uncorroborated; that even if the jury could find that beer was purchased from the machine, the State failed to prove that the defendant was responsible for the sale; and that the State failed to prove that the defendant acted recklessly. "When a defendant challenges the legal sufficiency of the evidence, we ask whether any rational trier of fact, viewing the evidence and reasonable inferences therefrom in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Fitanides, 139 N.H. 425, 428, 655 A.2d 411, 413-14 (1995).

By arguing that Strachan's testimony that he purchased beer from a vending machine at the fraternity house is

uncorroborated, the defendant is essentially asking this court to weigh the credibility of the witness. See State v. Champagne, 125 N.H. 648, 651-52, 484 A.2d 1161, 1163 (1984). "[T]he weight and credence to be given to the evidence at trial is the very essence of a jury's function." State v. Sands, 123 N.H. 570, 590, 467 A.2d 202, 214 (1983). When a defendant challenges the uncorroborated testimony of the State's witnesses, the decision to accept or reject the witnesses' testimony is "a matter which must be left to the trier of fact." Champagne, 125 N.H. at 652, 484 A.2d at 1163.

The defendant next argues that the State failed to prove that the defendant caused alcohol to be sold to Strachan. See RSA 179:5. The defendant asserts that because the fraternity voted not to provide beer at the rush and the soda machine was moved from the main area in the fraternity house to a separate apartment at the back of the house, the defendant did not have control over the machine, and, therefore, could not have caused the sale of alcohol from the machine. Essentially, the defendant is arguing that the individuals responsible for making the beer available for sale to Strachan were not acting on behalf of the corporation or within the scope of their authority. We begin by noting that the only defendant in this case is a corporate entity. "A corporation is a jural person, but not a person in fact. It is an artificial creature, acting only through agents . . . ." State v. Luv Pharmacy, Inc., 118 N.H. 398, 404, 388 A.2d 190, 194 (1978). A corporation may be held criminally liable for criminal acts performed on its behalf by agents or employees acting within the scope of their authority or employment. See State v. Pinardville Athletic Club, 134 N.H. 462, 465, 594 A.2d 1284, 1286 (1991). The criminal conduct need not have been "performed, authorized, ratified, adopted or tolerated by the corporation['s] directors, officers or other `high managerial agents'" in order to be chargeable to the corporation. See Com. v. L.A.L. Corp.,

511 N.E.2d 599, 601 (Mass. 1987) (quotation omitted).

In fact, a corporation can be convicted for actions of its agents even if it expressly instructed the agents not to engage in the criminal conduct. See State v. Hy Vee Food Stores, Inc., 533 N.W.2d 147, 150 (S.D. 1995). The agents, however, must have been acting within the scope of their actual or apparent authority. See United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); see also 19 C.J.S. Corporations § 738 (1990). Actual authority can be either express or implied. See Demetracopoulos v. Strafford Guidance Ctr., 130 N.H. 209, 213, 536 A.2d 189, 192 (1987). Express authority exists when the principal explicitly manifests its authorization for the agent to act. *Id.* Implied authority is the "reasonable incident or construction of the terms of express authority or results from acquiescence by the principal in a course of dealing by the agent." Id. at 215, 536 A.2d at 193 (quotation and ellipses omitted). Apparent authority, on the other hand, "exists where the principal so conducts [itself] as to cause a third party to reasonably believe that the agent is authorized to act." Id. (quotation omitted); see United States v. Bi-Co. Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984). It is the rare case in which the corporate leadership explicitly authorizes its agents to engage in criminal conduct. "Of necessity, the proof [of] authority to so act must rest on all the circumstances and conduct in a given situation and the reasonable inferences to be drawn therefrom." Commonwealth v. Beneficial Finance Co., 275 N.E.2d 33, 82-83 (Mass. 1971), cert. denied, 407 U.S. 910, 914 (1972).

Evidence at trial indicates that the defendant had control over the apartment in which the vending machine was located, even though it had voted to make the apartment separate from the fraternity house. More importantly, however, witnesses

testified that the defendant had control over the soda machine; that only the defendant had an interest in the proceeds from the machine; that only fraternity members had keys to the apartment in which the machine was located; that someone was making change for the machine; and that no one would have an interest in making change except a member of the fraternity. We believe that from these facts the jury could reasonably have found that an agent of the defendant sold beer from the vending machine and that this agent was acting on behalf of the corporation and within the scope of his authority. See Pinardville Athletic Club, 134 N.H. at 465, 594 A.2d at 1286.

The defendant next argues that the evidence was insufficient for the jury to find that the defendant acted recklessly, the mens rea charged in the indictment. Because the defendant is a corporation, its mental state depends on the knowledge of its agents. See United States v. T.I.M.E.-D.C., Inc., 381 F. Supp. 730, 738 (W.D. Va. 1974). "[T]he corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly." Id.; see United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir.), cert. denied, 484 U.S. 943 (1987).

> A person acts recklessly with respect to a material element of an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the circumstances known to him, its disregard constitutes a gross deviation from the conduct that a law-abiding person would observe in the situation.

RSA 626:2, II(c) (1986).

In this case, the jury could reasonably have found that the defendant acted recklessly from the facts that about 150 guests, many of them under the age of twenty-one, were at the rush party that had been widely publicized on campus; that it was the defendant's vending machine; that only fraternity members had keys to the apartment in which the machine was located; that party guests gained access to the machine; that someone was making change; and that a number of people were waiting in line to use the machine.

B. Prostitution

The defendant next argues that the evidence was insufficient for the jury to find that the defendant knowingly permitted a place under its control to be used for prostitution. See RSA 645:2, I(e). Specifically, the defendant argues that there was no evidence that actual sexual penetration occurred. Although it is not entirely clear from the defendant's brief, it appears that the defendant is arguing that sexual penetration requires physical intrusion. In this case, the indictment charged that a woman engaged in sexual penetration in return for consideration by allowing another to perform cunnilingus upon her. Sexual penetration is defined in RSA 632-A:1, V (Supp. 1995) to include cunnilingus or "[a]ny intrusion, however slight, of any part of the actor's body or any object manipulated by the actor into genital or anal openings of the victim's body."

We recently held in State v. Melcher, 140 N.H. 823, 678 A.2d 146 (1996), that sexual penetration as defined in RSA 632-A:1, V does not require proof of actual penetration when the act of fellatio is involved. We noted that sexual penetration was defined as the act of fellatio for the purpose of RSA

632-A:1, V and did not require proof of actual penetration in the sense of "passing through or into." Melcher, 140 N.H. at 826, 678 A.2d at 148. Similarly, RSA 632-A:1, V defines sexual penetration to include the act of cunnilingus. Although the statute does not separately define cunnilingus, it is commonly understood that cunnilingus means "stimulation of the vulva or clitoris with the lips or tongue." Webster's Third New International Dictionary 554 (unabridged ed. 1961). The act does not require actual penetration.

There was ample evidence for the jury to find in this case that the act of cunnilingus occurred. One witness specifically testified that he saw one of the guests "licking [the dancer's] vagina" for "quite a while." A number of other witnesses testified that they saw physical contact between guests' faces and the dancer's "crotch. Since cunnilingus does not require physical penetration, it is irrelevant that no witness could specifically testify to such physical intrusion.

The defendant next argues that even if cunnilingus occurred, the evidence was insufficient for the jury to find that it occurred in exchange for consideration. To the contrary, the record shows that the jury could find that the dancer allowed guests to perform oral sex in exchange for money. One witness, for example, testified, "I'm quite sure [a guest] gave her five dollars, and she took it before she allowed him to perform oral sex." Other witnesses also testified that guests tendered money and were led to the mattress where the stripper allowed them to perform oral sex on her.

The defendant also contends that the State failed to prove that the defendant knowingly allowed the prostitution and that if prostitution occurred, the individuals who allowed it were not acting within the scope of their authority. We will first address

the issue of agency.

As noted above, in the context of corporate criminal liability, the corporation acts through its agents and those agents must be acting within the scope of either their actual or apparent authority in order for the corporation to be liable for their actions. The defendant asserts that because the members of the fraternity announced that guests were not allowed to touch the dancers and that, if the dancer stayed too long with one guest, members of the fraternity would move her along, this indicated the lack of actual or apparent authority.

"[W]hether an agent has acted within his actual or apparent authority . . . is a question for the trier of fact." Cohen v. Frank Developers, Inc., 118 N.H. 512, 517, 389 A.2d 933, 936 (1978). Apparent authority can result when the principal "fails to disapprove of the agent's act or course of action so as to lead the public to believe that his agent possesses authority to act . . . in the name of the principal." 3 Am. Jur. 2d Agency § 79, at 586 (1986). In this case, there was testimony that the guests were told that if they paid more money the dancers would do more; that on more than one occasion guests were led to the mattress that was brought into the room by the brothers to perform oral sex in exchange for money; and that at least one guest performed oral sex on the dancer for "quite a while." From these facts the jury could reasonably have found that members of the fraternity acted within the scope of their authority and on behalf of the corporation in allowing oral sex to be performed in exchange for money.

The defendant argues that the State failed to prove the requisite mens rea with regard to the prostitution charge, that is, that the defendant knowingly permitted oral sex to occur at the party. See RSA 645:2, I(e). "A person acts knowingly with

respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist." RSA 626:2, II(b) (1986). The defendant argues that the material element to which the "knowingly" mens rea applies is permission. The defendant contends that there was no opportunity for the defendant to manifest its lack of permission before the oral sex occurred because the dancer's actions were unexpected.

Based on the facts of this case, the defendant's argument is without merit. As noted above, because the defendant is a corporation, and a corporation acts through its agents, the knowledge obtained by the agents of the corporation acting within the scope of their agency is imputed to the corporation. See Bank of New England, 821 F.2d at 856. There was testimony that several guests performed oral sex on the dancer and that on at least one occasion it occurred for several minutes. Moreover, the fraternity president testified that he "was very well in control" of the party. Therefore, even if the first act caught members of the fraternity by surprise, the jury could reasonably have inferred that the defendant knowingly permitted oral sex to occur from the defendant's failure to prevent the subsequent conduct. Cf. State v. Smokey's Steakhouse, Inc., 478 N.W.2d 361, 362 (N.D. 1991) ("A corporation is not insulated from criminal liability merely because it published instructions and policies which are violated by its employee; the corporation must place the acts outside the scope of an employee's employment by adequately enforcing its rules.").

II. Introduction of the Fraternity's Minutes Book

The defendant next challenges the trial court's decision to allow the minutes book of the fraternity's 1993 meetings to be introduced into evidence for the purpose of impeachment. The

defendant asserts that the book was improperly admitted pursuant to New Hampshire Rule of Evidence 608(b) and, even if it satisfies the requirements of Rule 608(b), it should have been excluded pursuant to New Hampshire Rule of Evidence 403 because its prejudicial effect substantially outweighed its probative value.

The defendant offered testimony that the fraternity had a policy to ensure that people under the age of twenty-one could not consume alcohol at fraternity events. During cross-examination, the State sought to impeach defense witnesses on the issue of the defendant's alcohol policy by means of minutes from fraternity meetings, which indicated that on a prior occasion the fraternity had plotted to circumvent the underage drinking law. At the time the minutes book was introduced by the State, the defendant objected. The only grounds for the objection fairly apparent on the record is the prejudicial nature of the entry. When the court offered to instruct the jury to consider the minutes book only for the purpose of impeachment, defense counsel responded that this satisfied his concerns. We therefore decline to rule on the issue of whether the minutes were properly admitted pursuant to Rule 608(b) because the defendant has failed to preserve this issue by making a specific objection and providing the trial court the opportunity to correct any error it may have made. See State v. Brinkman, 136 N.H. 716, 718, 621 A.2d 932, 934 (1993).

The defendant contends that the trial court erred in admitting the whole minutes book because there were a number of passages in the minutes in addition to the entry concerning the circumvention of the alcohol policy which prejudiced the jury against the defendant by making "the fraternity out to be a grubby, drunk, messy set of irresponsible underachievers." Because the defendant failed to make a specific objection on this

basis, the trial court did not have the opportunity to consider it, and we will therefore not rule on it on appeal. See id.

The only aspect of the defendant's Rule 403 objection that is apparent from the record is whether the prejudice from the entry in the minutes book concerning the prior attempt of the fraternity to circumvent the alcohol policy substantially outweighed its probative value. See N.H. R. Ev. 403. We review the trial court's decision to admit evidence under Rule 403 for an abuse of discretion. State v. Marti, 140 N.H. 692, 694, 672 A.2d 709, 711 (1996). "To prevail on an abuse of discretion claim, the defendant must show that the trial court's decision was clearly untenable or unreasonable to the prejudice of his case." Id. (quotation omitted).

Under Rule 403,

> evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case.

Id. (quotation and brackets omitted).

In the present case, the defendant introduced evidence of the fraternity's alcohol risk management policy. The State sought to counter the misleading impression created by this evidence by inquiring on cross-examination into instances reflected in the defendant's minutes book in which the fraternity attempted to skirt the law against underage drinking. "If a defense witness lies on the stand and thereby creates a misleading advantage, the State is entitled to counter with

evidence to refute the impressions created by his testimony." State v. Mello, 137 N.H. 597, 601, 631 A.2d 146, 148 (1993) (quotation and ellipses omitted). This evidence is properly probative of the witness's truthfulness. Cf. State v. Hurlburt, 132 N.H. 674, 675-76, 569 A.2d 1306, 1307 (1990). In order to minimize the prejudicial effect of this evidence, the trial court twice instructed the jury that it may consider the minutes only for the purpose of impeachment. While the defendant challenges the effectiveness of these instructions on appeal because of the way in which they were worded, he expressed his satisfaction with them at trial. Therefore, we believe that the trial court did not abuse its discretion in admitting the minutes for purposes of impeachment.

III. Constitutionality of the Defendant's Sentence

In addition to other terms not relevant for this opinion, the court sentenced the defendant to two years probation for the felony conviction of illegal sale of alcohol on the condition that

> the defendant shall not allow the consumption on its premises of alcoholic beverages, and the defendant's premises shall be subject to unannounced searches by the Department of Corrections or the Durham Police Department to determine compliance with paragraph (2) of the conditions of suspension and any condition of probation. A violation found by the Durham Police Department shall be brought to the attention of the Department of Corrections.

The defendant challenges the constitutionality of the sentence, arguing that the probation conditions violate part I, articles 15, 18, 19, and 33 of the New Hampshire Constitution and the fourth, eighth, and fourteenth amendments to the United

States Constitution. We address the defendant's claims first under the State Constitution, State v. Ball, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983), considering cases from the federal courts and courts of other jurisdictions only as an analytical aid, State v. Grant-Chase, 140 N.H. 264, 266, 665 A.2d 380, 382, (1995), cert. denied, 116 S. Ct. 1431 (1996). When, as in the instant case, federal law is not more favorable to the defendant, see Griffin v. Wisconsin, 483 U.S. 868 (1987); cf. Jones v. Murray, 962 F.2d 302, 306-07 (4th Cir.), cert. denied, 506 U.S. 977 (1992), we make no separate federal analysis. See Grant-Chase, 140 N.H. at 266, 665 A.2d at 382.

We first address the defendant's contention that the probation condition is unconstitutional because it authorizes the probation officer to conduct unannounced warrantless searches. We begin by observing that "[u]nder the New Hampshire Constitution, all warrantless searches are per se unreasonable, unless they conform to the narrow confines of a judicially recognized exception." State v. Sterndale, 139 N.H. 445, 447, 656 A.2d 409, 410 (1995). Exceptions to the warrant requirement have been recognized "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Griffin, 483 U.S. at 873 (quotation omitted); cf. State v. Drake, 139 N.H. 662, 665, 662 A.2d 265, 267 (1995).

In State v. Berrocales, 141 N.H. 262, 681 A.2d 95 (1996), we recognized that a warrantless search of a probationer is constitutionally permissible. Requiring a probation officer to obtain a warrant supported by probable cause would make it prohibitively difficult for the probation officer to carry out the officer's responsibilities of rehabilitation and supervision.

Probationers are subject to extensive regulation and

oversight by probation officers. See RSA ch. 504-A (Supp. 1996); RSA 651:2, V (1996 & Supp. 1996). Unannounced searches, even when the probation officer does not suspect that the probationer is violating his probation conditions, may be essential to adequately monitor the probationer's rehabilitation and protect the public. Cf. Drake, 139 N.H. at 665-66, 662 A.2d at 267 (noting that requiring a warrant and probable cause or reasonable suspicion would be impracticable due to special responsibilities of school officials). In discussing the need for warrantless searches of parolees, the Ninth Circuit has noted that

> [i]n order to fulfill his dual responsibilities for helping the parolee to reintegrate into society and evaluating his progress, and for preventing possible further anti-social or criminal conduct by the parolee, it is essential that the parole officer have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other persons, and what he is doing, both at home and outside it. It is equally important that this information be kept up to date. Much of this information can be obtained by methods which necessitate little or no invasion of the parolee's privacy, such as interviews with the parolee himself or with his employer, his family, or friends and visits to his house. However, these techniques have inherent limitations.

Latta v. Fitzharris, 521 F.2d 246, 249-50 (9th Cir. 1975) (citations omitted). These concerns apply equally in the context of probation. See United States v. Consuelo-Gonzalez, 521 F.2d 259, 266 (9th Cir. 1975); cf. RSA ch. 504-A.

We do not believe that a probation officer can adequately fulfill his statutory duties by simply monitoring the probationer's progress from a distance. A probationer may successfully conceal evidence of ongoing criminality or violations of probation conditions so that the probation officer has no suspicion of misconduct. See Latta, 521 F.2d at 250. To allow such behavior is counterproductive for the probationer's rehabilitation and exposes the public to preventable danger. At sentencing, the trial court specifically found that the probation conditions were necessary because the defendant had in the past plotted to circumvent the underage drinking laws and avoid detection by law enforcement.

Even where a warrant is not required, however, a search must still be reasonable. See State v. Turmelle, 132 N.H. 148, 153, 562 A.2d 196, 199 (1989). Although we hold, for the reasons stated above, that a warrant is not required to conduct a probation search, because probationers retain a degree of privacy interest, see Consuelo-Gonzalez, 521 F.2d at 265, the status of a probationer alone does not make every search reasonable. Probationary status, however, is one factor to consider when determining the reasonableness of a warrantless probation search. "[P]ersons conditionally released to society . . . may have a reduced expectation of privacy, thereby rendering certain intrusions by governmental authorities `reasonable' which otherwise would be invalid under traditional constitutional concepts, at least to the extent that such intrusions are necessitated by legitimate governmental demands." People v. Mason, 488 P.2d 630, 633 (Cal. 1971), cert. denied, 405 U.S. 1016 (1972). In other words, "[w]hile it must be recognized that probationers, like parolees and prisoners, properly are subject to limitations from which ordinary persons are free, it is also true that these limitations in the aggregate must serve the ends of probation." Consuelo-Gonzalez, 521 F.2d at 265.

In State v. Berrocales, we held that probation status coupled with reasonable suspicion that the probationer violated the terms of his probation made the warrantless search constitutionally permissible. Berrocales, 141 N.H. at 264-65, 681 A.2d at 97. The case at bar requires us to determine whether random warrantless searches of probationers not based on particularized suspicion of misconduct are constitutionally permissible if such searches are authorized as part of the defendant's conditions of probation.

We believe that when a condition of probation authorizes random warrantless searches and the condition is reasonably related to the supervision and rehabilitation of the probationer, a warrantless probation search is constitutionally permissible. See Griffin, 483 U.S. at 880 (holding that a warrantless search of probationer's home was constitutionally reasonable "because it was conducted pursuant to a valid regulation governing probationers"); cf. Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995) (holding that random suspicionless drug testing of high school athletes is constitutionally reasonable under the fourth amendment). When the grounds for a probation condition permitting searches of a probationer's residence are limited to furthering the goals of probation, the condition provides "a constitutionally adequate substitute for a warrant." Turmelle, 132 N.H. at 153, 562 A.2d at 199 (quotation omitted). Establishing reasonable grounds for the search condition assures that the probation officer will not use the search as a "subterfuge for uncovering evidence of criminal activity." Id. at 154, 562 A.2d at 200.

In this case, the defendant argues that the condition that the fraternity have no alcohol on the premises is unreasonable because the defendant was convicted for illegal sale of alcohol, not illegal possession of alcohol. We disagree. In order for the

grounds for the probation condition to be reasonable, it need only further the rehabilitation or supervision of the defendant. In United States v. Schoenrock, 868 F.2d 289 (8th Cir. 1989), for example, the defendant was convicted of conspiracy to distribute cocaine. Id. at 290. At sentencing, the court expressed concern about the defendant's drug and alcohol problem. Id. The court authorized random warrantless searches of the defendant's premises, vehicle, or person for the presence of alcoholic beverages or controlled substances. Id. at 290 n.3. After a search of the defendant's residence produced both alcohol and drugs, the defendant challenged the reasonableness of the probation conditions. Id. The court held:

> We have little difficulty in concluding that the probation conditions were reasonably related to rehabilitation and protection. The district court made careful findings that alcohol and substance abuse was a significant cause of Schoenrock's antisocial behavior, and carefully crafted the disputed terms so as to help Schoenrock change his ways while at the same time protecting the community.

Id. at 291.

As in Schoenrock, the trial court in this case specifically found that it was necessary to prohibit the consumption of alcohol on the fraternity premises. It authorized random searches because the evidence presented at trial "suggested a very clear effort on the part of that organization to come up with schemes to avoid the detection of law enforcement in the sale of alcohol to students who were minors at the University of New Hampshire." Although the defendant was not convicted of illegal possession or consumption of alcohol, it is clear from the findings of the trial court that prohibiting the consumption of

alcohol and authorizing warrantless searches to determine compliance with this condition were essential to ensure the effective rehabilitation and supervision of the defendant.

The defendant contends that the search condition is unreasonable because it authorizes searches without prior notice or announcement. We believe that forewarning of a probation search would drastically undermine the supervisory deterrent effect of such searches, and is therefore not required. While we hold that the probation authorities do not need a particularized suspicion that the probationer is violating the conditions of its probation in order to conduct a search based on a reasonably imposed probation condition and do not need to announce their intention to search in advance, this does not give probation officers carte blanche to execute the search in an unreasonable manner. As courts have noted in the context of warrantless random parole searches:

> In a given case, what is done may be so unreasonable as to require that the search be held to violate the Fourth Amendment. For example, harassment or intimidation is no part of a parole officer's job. In short, we do not accept the notion that parole officers may conduct full-blown searches of parolees' homes whenever and as often as they feel like it. To do so would practically gut the principle that parolees are entitled to some privacy. Moreover, it would not advance the goals of the parole system. Indeed, it has been suggested that providing parole authorities with an unlimited power to conduct indiscriminate searches actually undermines the rehabilitation process.

Latta, 521 F.2d at 252; see United States v. Follette, 282 F.

Supp. 10, 13 (S.D.N.Y. 1968) (noting that "a search could become `unreasonable' . . . if made too often or if made at an unreasonable hour or if unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the parole officer"), aff'd, 418 F.2d 1319 (2d Cir. 1969), cert. denied, 402 U.S. 984 (1971). Therefore, in order for a warrantless probation search condition to be constitutional it must be related to the rehabilitation or supervision of the defendant, and the search itself must be conducted in a manner that is reasonable in time, scope, and frequency.

Finally, the defendant argues that the provision of the sentence allowing the Durham police to conduct searches of the fraternity house violates the State Constitution. At oral argument, the State conceded that to the extent the probation condition allowed the Durham police independently to search the defendant's house, the condition was invalid. We agree.

Rehabilitation and protection of the public are the central objectives of a sentence of probation. See Berrocales, 141 N.H. at 264, 681 A.2d at 96; see also RSA 651:2, V. Probation officers are charged with the duty "to assist [probationers] in establishing law-abiding lives while monitoring their behavior through office, home, work, and other contacts to insure that they comply with their probation . . . conditions." RSA 504-A:12, II (Supp. 1996). Police officers, on the other hand, are charged with the responsibility of enforcing the criminal laws of the State and protecting the public by the investigation of criminal activity. See RSA 104:6 (1990); RSA 105:3 (1990); RSA 106-B:12 (1990). While probation officers also have some powers of law enforcement, see RSA 504-A:12 (Supp. 1996), these powers are intended to assist the probation officer in his duties to rehabilitate the defendant and protect the public. See Consuelo-Gonzalez, 521 F.2d at 266-67; cf. Latta, 521 F.2d at

249. Because of the probation officer's responsibilities toward the probationer and the public, "[p]robation authorities . . . have a special and unique interest in invading the privacy of probationers." Consuelo-Gonzalez, 521 F.2d at 266. This interest, however, does not extend to law enforcement officers. See id.; cf. Griffin, 483 U.S. at 876-77 (comparing duties of probation officer and police officer). The police should not be able to use the probation officer as a "stalking horse" to further their own independent criminal investigations by circumventing the warrant requirement. See United States v. Martin, 25 F.3d 293, 296 (6th Cir. 1994).

We hold that because the police do not have the same special statutory responsibilities toward the probationer as does the probation officer, a condition of probation authorizing the police to conduct warrantless searches is unreasonable under part I, article 19 of the New Hampshire Constitution. Nothing said here, however, "is intended to preclude mutually beneficial cooperation between probation officers and other law enforcement officials. For example, a proper visitation by a probation officer does not cease to be so because he is accompanied by a law enforcement official." Consuelo-Gonzalez, 521 F.2d at 267.

Because the sentence in this case allows the police to search independently of probation officers, and because it does not require that the probation officer's search be conducted in a reasonable manner, we vacate the sentence in this case and remand for resentencing not inconsistent with this opinion.

Convictions affirmed; sentence vacated; remanded for resentencing.

BROCK, C.J., and BRODERICK, J., concurred in part and dissented in part; the others concurred.

BROCK, C.J., and BRODERICK, J., concurring in part and dissenting in part: We concur in parts I and II of the majority opinion. Because we believe the majority's interpretation of part I, article 19 of the New Hampshire Constitution as applied in the probation context is in error, we respectfully dissent from part III of the majority opinion.

In the majority's view, the probation search condition at issue is constitutionally permissible under part I, article 19 even though it allows probation officers the freedom to conduct random, unannounced searches of the person, home, and possessions of the probationer -- and, quite possibly, of nonprobationer third parties -- without so much as a shred of individualized suspicion that the probationer has violated the terms of his or her probation. The majority apparently believes that the constitutional prohibition against unreasonable searches, in the case of probationers, requires only that a probation condition authorizing searches "be related to the rehabilitation or supervision of the [probationer], and the search itself . . . be conducted in a manner that is reasonable in time, scope, and frequency." Supra at p. 13. This interpretation of our State constitutional protection against unreasonable searches and seizures finds no support in our history or the precedents of this court.

Like the fourth amendment to the United States Constitution, with which it shares a common ancestry, see State v. Pellicci, 133 N.H. 523, 539, 580 A.2d 710, 720 (1990) (Brock, C.J., concurring), part I, article 19 has "both the virtue of brevity and the vice of ambiguity," J. Landynski, Search and Seizure and the Supreme Court: A Study in Constitutional

Interpretation 42 (1966). History provides us some guidance in our attempts to interpret the constitutional mandate that "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions," N.H. CONST. pt. I, art. 19. See Landynski, supra at 19-20.

The primary object of constitutional provisions like part I, article 19 was the full-scale search of persons, homes, and property by governmental authorities absent any individualized suspicion of wrongdoing. See Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 U. Mem. L. Rev. 483, 489 (1995); Landynski, supra at 20. As one commentator has observed, "the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures." Clancy, supra at 489. It follows that part I, article 19 should be interpreted as requiring, at a minimum, that the State have some degree of suspicion justifying a search at its inception. See Clancy, supra at 530-31; cf. Chandler v. Miller, 117 S. Ct. 1295, 1301 (1997) (stating that reasonable searches under the fourth amendment "ordinarily must be based on individualized suspicion of wrongdoing"). This court has consistently adhered to this principle, reasoning, for example, that to justify even the relatively limited privacy intrusion of an investigatory stop, the investigating officer must have some articulable suspicion that a crime has occurred. See, e.g., State v. Brodeur, 126 N.H. 411, 415, 493 A.2d 1134, 1137-38 (1985).

This principle is of particular moment when, as in this case, the search involves a person's home. History teaches that "the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those

involving invasions of the home." United States v. Chadwick, 433 U.S. 1, 8 (1977). This court has acknowledged that the protections afforded by the fourth amendment and part I, article 19 "are never in sharper focus" than when viewed in respect to the home. State v. Thompson, 132 N.H. 730, 733-34, 571 A.2d 266, 268-69 (1990); see State v. Chaisson, 125 N.H. 810, 816, 486 A.2d 297, 302 (1984). Accordingly, the court has concluded that when "entry is made into an individual's private dwelling, where there exists a strong expectation of privacy and protection from government intrusion, the requirement of a warrant is particularly stringent." State v. Santana, 133 N.H. 798, 803, 586 A.2d 77, 80 (1991) (quotations omitted).

It is true that suspicionless search regimes may be valid in "certain limited circumstances." Chandler, 117 S. Ct. at 1298. Among the prerequisites to the validity of such a search regime, however, is that it implicate only minimal privacy interests. See id. at 1301. Unlike a courthouse weapons search, see State v. Plante, 134 N.H. 585, 588, 594 A.2d 165, 167, cert. denied, 502 U.S. 984 (1991), or a brief stop for questioning at a sobriety checkpoint, see Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 447, 451 (1990), a search conducted under the authority of the sentencing order in this case implicates significant privacy interests; indeed, it could involve extensive -- and potentially unlimited -- rummaging through an individual's personal belongings and home. As compared to those few suspicionless search regimes that have been upheld, a search executed under this sentencing order could scarcely be characterized as minimally intrusive. See, e.g., Sitz, 496 U.S. at 451-52 (describing as "minimal" the intrusion occasioned by stops of motorists at sobriety checkpoints).

The majority nonetheless authorizes suspicionless searches of probationers and their homes, concluding that individualized

suspicion, the most fundamental protection of part I, article 19, will hinder the State's ability to supervise probationers with the certainty the State desires. In some cases it might. But it is well established under our constitution that the privacy interests of individuals -- particularly in their homes -- take precedence over the State's needs; this is the underlying premise of part I, article 19. Cf. State v. Canelo, 139 N.H. 376, 386, 653 A.2d 1097, 1104-05 (1995). In other words, the question whether a suspicionless search regime is "better" than a suspicion-based regime is irrelevant, for the framers of our constitution have already resolved this issue. See Vernonia School Dist. 47J v. Acton, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting) (observing in regard to the fourth amendment that "it is not open to judges or government officials to decide on policy grounds which is better and which is worse").

Despite its often narrow interpretation of the protections afforded citizens under the fourth amendment, the United States Supreme Court has not sanctioned suspicionless searches of a probationer's home, and the majority errs in assuming that no separate federal analysis is required in this case. In Griffin v. Wisconsin, 483 U.S. 868 (1987), the Supreme Court upheld a warrantless search of a probationer's residence by probation officers because the search was conducted "pursuant to a regulation that itself satisfie[d] the Fourth Amendment's reasonableness requirement." Id. at 873. The regulation authorized warrantless searches, with the approval of a supervisor, so long as the probation officer had "reasonable grounds" to believe contraband was present. Id. at 870-71. Significantly, the Griffin Court did not so much as imply that a regulation allowing suspicionless searches would have been constitutional, and the case can not fairly be read to support the proposition that such a regime would "fit within the closely guarded category of constitutionally permissible suspicionless

searches." Chandler, 117 S. Ct. at 1298.

Nor did the Court specifically address the question whether the search in Griffin would have satisfied the fourth amendment absent the existence of a constitutionally valid regulation. Courts considering this question, however, have concluded that absent such a regulation, the Supreme Court likely would interpret the fourth amendment as requiring at least that probation officers have some individualized suspicion prior to searching a probationer and his home. See, e.g., United States v. Giannetta, 909 F.2d 571, 576 (1st. Cir. 1990) (noting that condition allowing search by probation officer without suspicion "would appear to conflict with the dictates of Griffin"); Com. v. LaFrance, 525 N.E.2d 379, 381 (Mass. 1988) (suspecting that "Supreme Court would approve of a warrantless search of a probationer's residence based on . . . reasonable suspicion"). Indeed, given the traditional importance of privacy in the home, it seems doubtful that the Court would uphold suspicionless searches of a probationer's residence.

Apart from its constitutional analysis, the majority's opinion presents practical problems. In State v. Berrocales, 141 N.H. 262, 681 A.2d 95 (1996), this court acknowledged that the special needs of the State in the probation context -- rehabilitation and protection of the public -- justify an exception to the requirements of probable cause and a warrant, and the court held that a search of a probationer's home will be valid if premised upon a reasonable suspicion that the probationer has violated the terms of probation. See id. at 264, 681 A.2d at 96-97. The majority in this case eliminates the requirement of individualized suspicion to further the State's interests in public safety and rehabilitation. In fact, such a search regime more likely will undermine both interests:

> [A] person should not be released on . . . probation when the risks are so substantial that it is necessary to authorize the highly intrusive practice of full searches of living quarters based upon nothing other than the risks as perceived at the time of release. Stated another way, it is inherently inconsistent to release a person on probation . . . for purposes of rehabilitation and at the same time condition that release upon that person's residence being subject to indiscriminate and highly intrusive searches . . . .

4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 10.10(d), at 777 (3d ed. 1996) (footnotes omitted). Under the majority opinion, there is little practical difference between a probationer in his home and an inmate subject to the privacy restrictions attendant to incarceration; if the former requires the same degree of supervision as the latter, both the State Constitution and public safety would be better served by imprisonment.

To be sure, as explained in Berrocales, the rights of probationers under part I, article 19 may in certain cases be more circumscribed than those of nonprobationers. See Berrocales, 141 N.H. at 264, 681 A.2d at 96. This does not mean that probationers (or their family members) may be stripped of all meaningful protections against searches and seizures. See United States v. Jeffers, 573 F.2d 1074, 1075 (9th Cir. 1978) (per curiam) (implicitly recognizing that probationers enjoy some fourth amendment protections). "That there is a less demanding constitutional standard to be met in justifying a warrantless search of a . . . probationer does not authorize the court to impose an unconstitutional sanction as a condition of probation." People v. Suttell, 492 N.Y.S.2d 192, 195 (App. Div.), appeal denied, 488 N.E.2d 128 (N.Y. 1985). To the

extent the sentencing order in this case allows searches of a residence absent some individualized suspicion by a probation officer that the defendant has violated or will violate the terms of probation, it is constitutionally invalid.

The majority today renders illusory any privacy interest retained by probationers. The right to enjoy the privacy of one's home free from unjustified intrusion by the State is among the constitutional freedoms that comprise "our legacy of ordered liberty." State v. Cavanaugh, 138 N.H. 193, 201, 635 A.2d 1382, 1387 (1993) (Batchelder, J., dissenting). One who defends these freedoms "must share his foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply." Kopf v. Skyrm, 993 F.2d 374, 380 (4th Cir. 1993). These freedoms are rarely lost or compromised in sweeping pronouncements; rather, their erosion, when it occurs, most often happens by well-intentioned and incremental, even subtle, steps. The majority takes such a step today, and from that decision we respectfully dissent.

(2)

FILED

OCT 24 1997

CLERK

No. 97-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

THE STATE OF NEW HAMPSHIRE
PHILIP T. MCLAUGHLIN
Attorney General
MICHAEL D. RAMSDELL*
Associate Attorney General
ANN M. RICE
Senior Assistant Attorney General
JOHN C. KISSINGER
Assistant Attorney General
CRIMINAL JUSTICE BUREAU
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3671

Attorneys for Respondent
** Counsel of Record*

October 24, 1997

16 pp

RE-STATED QUESTION PRESENTED

Whether a condition of probation, authorizing a probation officer to conduct a warrantless search of the probationer's residence that is reasonably related to the supervision and rehabilitation of the probationer, violates the Fourth Amendment guarantee against unreasonable searches where there is no requirement of individualized suspicion.

TABLE OF CONTENTS

	Page
RESTATED QUESTION PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE COURT IS WITHOUT JURISDICTION TO CONSIDER THE ISSUE PRESENTED	4
A. The Case Is Moot	4
B. The Case Does Not Present An Actual Controversy	6
CONCLUSION	8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 81 L. Ed. 2d 617, 57 S. Ct. 461 (1937) 7

Asarco Inc. v. Kadish, 490 U.S. 605, 104 L. Ed. 696, 109 S. Ct. 2037 (1989) 6

Burke v. Barnes, 479 U.S. 361, 93 L. Ed. 2d 732, 107 S. Ct. 734 (1987) 4

Carafas v. Lavallee, 391 U.S. 234, 20 L. Ed. 2d 554, 88 S. Ct. 1556 (1968) 5

Deakins v. Monaghan, 484 U.S. 193, 98 L. Ed. 2d 529, 108 S. Ct. 523 (1988) 4

Fiswick v. United States, 329 U.S. 211, 91 L. Ed. 196, 67 S.Ct. 224) (1946) 5

Flast v. Cohen, 392 U.S. 83, 20 L. Ed. 2d 947, 88 S.Ct. 1942 (1968) 7

Horton v. California, 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990) 6

Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 78 L. Ed. 2d 58, 104 S. Ct. 373 (1983) 6

Laird v. Tatum, 408 U.S. 1, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972) 7

Page

FEDERAL CASES, Cont.

Minnesota v. Dickerson, 508 U.S. 366, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993) 4, 6

North Carolina v. Rice, 404 U.S. 244, 30 L. Ed. 2d 413, 92 S.Ct. 402 (1971) 7

Sibron v. New York, 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968) 5

Sosna v. Iowa, 419 U.S. 393, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975) 5

United F. & C. Workers v. Brown Group, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996) 6

Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) 7

STATE CASES

Naylor v. Sup. Ct. of State of Ariz., Etc., 558 F.2d 1363 (1977), *cert. denied*, 435 U.S. 946, 55 L. Ed. 2d 544, 98 S.Ct. 1530 (1978) 5

Scott v. Pennsylvania Bd. of Probation & Parole, 698 A.2d 32 (Pa.1997), *cert. petition filed*, (U.S. Sept. 30, 1997) (No. 97-581) 6

State v. Zeta Chi Beta Fraternity, 142 N.H. ____, 696 A.2d 530 (1997) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the New Hampshire Supreme Court affirming the petitioner's conviction is reported at 142 N.H. ____, 696 A.2d 530 (1997).

JURISDICTION

Judgment of the New Hampshire Supreme Court was entered on May 22, 1997. The petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. §1257(a). However, as discussed in detail *infra*, the respondent asserts that the Court is without jurisdiction to address the issue presented.

STATEMENT OF THE CASE

The petitioner, a New Hampshire corporation, was charged with the offenses of prostitution and prohibited sale of alco-

hol. A jury found the petitioner guilty as charged and the New Hampshire Supreme Court affirmed the verdicts in an opinion dated May 22, 1997. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 1-28.

The relevant facts as found by the New Hampshire Supreme Court are fully set forth in the opinion from which the petitioner appeals to this court. A review of those facts reveals that on February 21, 1994, the petitioner, a fraternity at the University of New Hampshire in Durham, New Hampshire, held a "rush" at its fraternity house to attract new members. To encourage people to attend, the petitioner hired two female strippers to perform at the event. Fraternity brothers encouraged the guests to pay the strippers, and suggested that the extent and nature of the women's entertainment would depend upon the amount of money they received. Over the course of the evening, a number of guests performed oral sex on one of the strippers in exchange for money. Pet. App. at 2.

During the party, one of the guests, nineteen year-old Andrew Strachan, learned that beer was available from a soda machine at the fraternity house. He found the machine, waited in line with three or four other people, and eventually purchased three to five cans of beer. The machine and its proceeds were under the petitioner's control. Pet. App. at 2-3.

Following its conviction, the petitioner was sentenced, *inter alia*, to two years probation for the felony offense of illegal sale of alcohol. The terms of probation included the following condition:

> The [petitioner] shall not allow the consumption on its premises of alcoholic beverages, and the [petitioner's] premises shall be subject to unannounced searches by the Department of Corrections

> or the Durham Police Department to determine compliance with . . . any condition of probation. A violation found by the Durham Police Department shall be brought to the attention of the Department of Corrections.

Pet. App. at 13.

The petitioner appealed the sentence to the New Hampshire Supreme Court, challenging the constitutionality of the above-quoted condition under the state and federal constitutions. The petitioner asserted, *inter alia*, that the condition impermissibly authorized unannounced, warrantless searches by probation officers and the Durham Police Department. At oral argument before the state court, the State conceded that to the extent the probation condition allowed the Durham police independently to search the petitioner's corporate premises, the condition was invalid. Pet. App. at 20. The New Hampshire Supreme Court held that, "when a condition of probation authorizes random warrantless searches and the condition is reasonably related to the supervision and rehabilitation of the probationer, a warrantless probation search is constitutionally permissible." Pet. App. at 17. However, because the sentencing order did not mandate that the probation officer's search be conducted in a reasonable manner, as defined in the opinion, the court vacated the sentence and remanded the case to the trial court for resentencing not inconsistent with its opinion. Pet. App. at 21.

On September 9, 1997, the sentencing order was amended in accordance with the dictates of the New Hampshire Supreme Court. Appendix to Brief in Opposition ("Appendix") at 1a. In the interim, on November 10, 1996, the petitioner's probation expired under the express terms of the sentence. Appendix at 1a.

ARGUMENT

I. THE COURT IS WITHOUT JURISDICTION TO CONSIDER THE ISSUE PRESENTED

A. The Case Is Moot

Article III of the Constitution restricts the jurisdiction of this Court to the "adjudication of actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199, 98 L. Ed. 2d 529, 108 S. Ct. 523 (1988). Jurisdiction does not lie simply because a live controversy existed at the time the case was decided by the lower court. *Burke v. Barnes*, 479 U.S. 361, 363, 93 L. Ed. 2d 732, 107 S. Ct. 734 (1987). The dispute must be presently existing when the case is considered by this Court.

The issue raised by the appellant concerns the application of a condition of probation imposed upon it on November 10, 1994. By the express terms of the sentencing order, the probationary term expired on November 10, 1996, two years after its imposition. Appendix at 2a. The appellant is no longer subject to the challenged probationary term. Accordingly, the issue of the constitutionality of that term, as applied to the appellant, is moot. *See Burke v. Barnes*, 479 U.S. at 364, 93 L. Ed. 2d 732, 107 S. Ct. 734 (1987) (issue of whether legislative bill became law was moot where bill expired by its own terms).

This is not a situation where potential collateral consequences render what would otherwise be a moot issue live. *Compare Minnesota v. Dickerson*, 508 U.S. 366, 371, n. 2, 124 L. Ed. 2d 334, 113 S. Ct. 2130 (1993) (live controversy remains, despite statute providing that finding of guilt not deemed a conviction for purposes of legal disqualifications arising from criminal convictions, where record of guilty finding could be reinstated and used against respondent in fu-

ture criminal proceedings); *Sibron v. New York*, 392 U.S. 40, 55, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968) (criminal matter did not become moot upon satisfaction of sentence; possibility of adverse collateral legal consequences was sufficient to create justiciable controversy); *Carafas v. Lavallee*, 391 U.S. 234, 237, 20 L. Ed. 2d 554, 88 S. Ct. 1556 (1968) (although petitioner had fully satisfied his criminal sentence, challenge to legality of sentence was not moot; the collateral consequences flowing from conviction gave petitioner a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.") (quoting *Fiswick v. United States*, 329 U.S. 211, 222, 91 L. Ed. 196, 203, 67 S.Ct. 224) (1946)). The appellant is not challenging the legality of his underlying conviction or the imposition of probation. It is simply disputing the constitutionality of one specific, and now expired, condition of probation. Unlike a criminal conviction, there are no "disabilities or burdens" that may flow from the probationary condition. Thus, the appellant has no ongoing stake in a determination of the condition's constitutionality. *See Naylor v. Sup. Ct. of State of Ariz., Etc.*, 558 F.2d 1363 (1977) (petitioner's habeas challenge to legality of underlying misdemeanor conviction was moot where imposed term of 90 days probation had expired and no adverse collateral consequences from the conviction remained), *cert. denied*, 435 U.S. 946, 55 L. Ed. 2d 544, 98 S.Ct. 1530 (1978).

Further, the issue the appellant seeks to litigate is not one that will likely escape appellate review if raised in future cases. *See Sosna v. Iowa*, 419 U.S. 393, 399-401, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975) (although named plaintiff was no longer being harmed by enforcement of one-year residency requirement, class action suit challenging constitutionality of the requirement was not moot where issue was likely to arise in future but escape appellate review because of requirement's time-limited applicability). Issues such as the one presented here frequently arise in the context of an appeal from a decision granting or denying a motion to sup-

press evidence gained as a result of an allegedly illegal search. *See, e.g., Minnesota v. Dickerson*, 508 U.S. 366, 124 L.Ed. 2d 334, 113 S. Ct. 2130 (1993) (whether seizure of lump of cocaine from defendant's pocket, detected during frisk search, violated Fourth Amendment where officer had to conduct further search to determine that lump was contraband); *Horton v. California*, 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990) (whether warrantless seizure of weapons from defendant's home was prohibited by Fourth Amendment where weapons were in plain view but discovery was not inadvertent); *Scott v. Pennsylvania Bd. of Probation & Parole*, 698 A.2d 32 (Pa.1997) (warrantless search of parolee's residence by parole officer found to violate Fourth Amendment, notwithstanding parolee's signing of parole agreement authorizing warrantless search of residence, where search not based on reasonable suspicion; evidence seized as a result held not admissible at parole revocation hearing) *cert. petition filed*, (U.S. Sept. 30, 1997) (No. 97-581). As noted above, such challenges typically do not become moot with the passage of time due to the potential adverse collateral consequences of a criminal conviction. *See e.g. Minnesota v. Dickerson*, 508 U.S. at 371, n. 2.

B. The Case Does Not Present An Actual Controversy

The Article III case-or-controversy restriction makes the existence of a genuine controversy essential to the exercise of this Court's jurisdiction. *Asarco Inc. v. Kadish*, 490 U.S. 605, 619, 104 L. Ed. 696, 109 S. Ct. 2037 (1989). At a minimum, it requires that the party invoking the Court's authority demonstrate that there is "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United F. & C. Workers v. Brown Group*, 134 L. Ed. 2d 758, 766, 116 S. Ct. 1529 (1996). *See also Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70, 78 L. Ed.

2d 58, 104 S. Ct. 373 (1983) ("To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision."). No justiciable dispute is presented where a litigant is seeking an advisory opinion based on a hypothetical situation. *Flast v. Cohen*, 392 U.S. 83, 95, 20 L. Ed. 2d 947, 88 S.Ct. 1942 (1968). *See also North Carolina v. Rice*, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 92 S.Ct. 402 (1971) (case must present "real and substantial controversy admitting of specific relief . . . , as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 81 L. Ed. 2d 617, 57 S. Ct. 461 (1937)).

The instant petition for certiorari presents no genuine, justiciable controversy. The appellant does not assert that it has suffered any injury as a result of the challenged condition of probation. Indeed, the petition is silent with respect to whether the condition was actually enforced and under what circumstances. The appellant is simply asking this Court to advise the parties, without reference to the facts of a particular search, whether the probationary condition at issue is violative of the fourth amendment guarantee against unreasonable searches. *Compare Laird v. Tatum*, 408 U.S. 1, 11-14, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972) (declaratory judgment action seeking declaration that litigant's First Amendment rights were being impermissibly chilled by certain governmental surveillance activities did not present justiciable controversy where there was no claim of actual injury; "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.") *with Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) (Court considered action seeking declaratory and injunctive relief against enforcement of school policy requiring all students participating in interscholastic activities to submit to random drug testing where litigant had been pro-

hibited from engaging in activities because parents refused to sign testing consent form). The Constitution does not permit the issuance of such advisory opinions.

CONCLUSION

Although the petitioner is correct in its assertion that there is currently a split of authority on the issue of whether a probation search must be justified by individualized suspicion, this is not a case in which the Court should address the issue. Not only is the issue moot and no genuine controversy is presented, the facts of the case are relatively unique. The petitioner is a corporation and the issues surrounding the search of a corporate premises may differ from those involved in the search of an individual. Accordingly, a decision by this Court in this case may not have broad applicability.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

PHILIP T. MCLAUGHLIN
Attorney General

MICHAEL D. RAMSDELL
Associate Attorney General

CRIMINAL JUSTICE BUREAU
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

APPENDIX

APPENDIX 1a

THE STATE OF NEW HAMPSHIRE

Strafford County **Superior Court** **No. 94-S-197-F**

RETURN FROM SUPERIOR COURT SEP 16 '97

Name: Zeta Chi Fraternity, Assoc., UNH, 17 Madbury Rd., Durham NH DOB: n/a

■ Indictment ☐ Waiver ☐ Information ☐ Complaint

Offense: Prohibited Sales RSA: 175:6 Date: 02/21/94

Disposition: Guilty By ☐ Plea ■ Jury ☐ Court on 10/7/94 T/N: n/a

Sentence: 11/10/94: A finding of Guilty is entered. Def. Zeta Chi is sentenced as follows: Def. is fined $50,000.00 Plus statutory penalty assessment. All of the fine & penalty Assessment are suspended on the following cond.'s: Between 12/1/94 & 6/1/96, members of the def. corporation perform 2500 hrs. of community service under the direction of the Dept.of Cor.'s, Div. of Field Services in Strafford Cty. on such projects & such time schedules as the Dept. of Cor.'s deems appropriate; & def. shall not allow the consumption of alcoholic beverages on its premises in Durham, NH for a prd. of 2 yrs. Fine & penalty assessment may be brought forward only w/in 3 yrs. of this date. Def. is placed on prob. for 2 yrs., on such terms as to supervision as the Dept. of Cor.'s deems appropriate. RSA 651:2,V. As cond.'s of prob., the def. shall not allow the consumption of alcoholic beverages on its premises in Durham, NH, & the def.'s premises shall be subject to unannounced searches by the Dept. of Cor.'s, or the Durham Police Department, to determine compliance w/paragraph 2 of the cond. of suspension & any cond. of prob. Any Viol. found by the Durham Police Dept. shall be brought to the attention of the Dept. of Cor.'s. Superior Court Rule 107 (h). Def., through its officers shall meet w/the Div. of Field Serv. w/in 10 days to implement the terms & cond. of this order. Viol. of the terms & cond. of prob. may result in the revocation of prob. & the imposition of any sent. w/in the limit prescribed by law for this offense. This sent. is consecutive to the sent. in 94-S-199-F. So Ordered. (MOHL PJ)

9/9/97: Agreement amending the sentence: In accordance w/the NH Supreme Crt. decision of 5/22/97, the cond.'s of prob. portion of the sent. in the above matter may be amended by deleting from the 11th line of said sentence the words, "or the Durham Police Dept." & by deleting the sentence, "any viol. found by the Durham Police Dept. shall be brought to the attention of the Dept. of Cor.'s" which begins at line 12 of said sentence. This agreement is entered into in order to bring the sent. in this matter into compliance w/the aforesaid NH Sup. Crt. decision & is not intended any waiver of the def.'s rights to file an Appeal of the aforesaid NH Supreme Crt. decision w/the Supreme Crt. of the US as to whether or not a cond. of prob. which provides that a prob. officer can conduct searches w/no individualized suspicion violates the 4th amendment's guarantee against unreasonable searches, or as to any other questions & issues in this matter which may be accepted by the Sup. Crt. of the US for determination. SO ORDERED (MOHL PJ)

11/10/94 BRUCE F. MOHL Julie W. Howard
Date Presiding Justice Clerk

cc: ■ State Police ☐ Division of Motor Vehicle ■ Department of Corrections
☐ Defendant ■ Prosecuting Attorney ☐ Office of Cost Containment
☐ Sheriff ☐ GAL ☐ District Court
■ Defense Counsel ☐ Sentence Review Board
(J. P. NADEAU, ESQ.)

■ Durham Police Dept.

DISPOSITION/MITTIMUS

(3)

Supreme Court, U.S.
FILED
NOV 17 1997

No. 97-346

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

J. P. Nadeau
Nadeau Prof. Office
507 State St.
Portsmouth, NH 03801
(603) 436-0110

November 17, 1997

BEST AVAILABLE COPY

26 pp

QUESTIONS PRESENTED

1. Does a condition of probation providing that a probation officer can conduct searches with no individualized suspicion violate the Fourth Amendment's guarantee against unreasonable searches?

2. Does the expiration of a fraternal organization's term of probation render its appeal moot when the fraternity took all diligent steps to expedite its case through the judicial system, when it suffers collateral consequences as a result of the search condition and the underlying conviction, when the duration of probation was necessarily too short for it to be reviewed but the situation is likely to be repeated, when the conditions of probation chill its members' rights of association, when the theoretical underpinnings of mootness are unresolved, and when it is unfair for the State to violate individuals' and organizations' rights against warrantless searches yet stand behind a procedural doctrine preventing review.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... *i*

TABLE OF AUTHORITIES ..... *iii*

REPORT OF OPINION BELOW *1*

STATEMENT OF FACTS CONCERNING MOOTNESS *2*

REASONS CASE IS NOT MOOT *3*

I. Zeta Chi was Diligent in Prosecuting its Appeal .. *3*
II. The Sentence has Collateral Consequences *4*
III. This Case is Capable of Repetition Yet Evading Review *6*
IV. Mootness Standards are Relaxed When Constitutional Violations are Alleged *8*
V. This Case Presents a Unique Opportunity to Address Unresolved Issues of Mootness Law and of Organizational Sentencing *9*

CONCLUSION *10*

APPENDIX ..... *following*

TABLE OF AUTHORITIES

FEDERAL CASES

Bigelow v. Virginia,
421 U.S. 809 (1975) *8*

Burlington N. R. Co. v. Maintenance of Way Employees,
481 U.S. 429 (1987) *6*

California Coastal Commission v. Granite Rock Co.,
480 U.S. 572 (1987) *6*

Carafas v. LaVallee,
391 U.S. 234 (1968) *4,5*

Edmonson v. Leesville Concrete Co.,
500 U.S. 614 (1991) *8*

Fiswick v. United States,
329 U.S. 211 (1946) *4,6*

Ginsberg v. New York,
390 U.S. 629 (1968), *reh'g denied*, 391 U.S. 971 ... *5,6*

Honig v. Doe,
484 U.S. 305 (1988) *6,7,9*

International Organization of Masters, Mates & Pilots v. Brown,
498 U.S. 466 (1991) *7*

Lane v. Williams,
455 U.S. 624 (1982) *5*

Los Angeles v. Lyons,
461 U.S. 95 (1983) 7

Maryland v. Munson Co.,
467 U.S. 947 (1984) 8

Meyer v. Grant,
486 U.S. 414 (1988) 7

Murphy v. Hunt,
455 U.S. 478 (1982) 6,7

North Carolina v. Rice,
404 U.S. 244 (1971) 5

OShea v. Littleton,
414 U.S. 488 (1974) 7

Pollard v. United States,
352 U.S. 354 (1957) 5

Roe v. Wade,
410 U.S. 113 (1973) 7

Sibron v. New York,
392 U.S. 40 (1968) 3,4

Southern Pacific Terminal Co. v. I.C.C.,
219 U.S. 498 (1911) 6

St. Pierre v. United States,
319 U.S. 41 (1943) 4

Street v. New York,
394 U.S. 576 (1969) 3,5

United States Parole Commission v. Geraghty,
445 U.S. 388 (1980) *6,8,9*

United States v. Morgan,
346 U.S. 502 (1954) *5,6*

Wetzel v. Ohio,
371 U.S. 62 (1962) *5*

NEW HAMPSHIRE CASE

State of New Hampshire v. Zeta Chi Fraternity,
142 N.H. 16, 696 A.2d 530 (1997) *1*

NEW HAMPSHIRE STATUTES

N.H. Rev. Stat. Ann. § 504-A:1 *et seq* *8*

N.H. Rev. Stat. Ann §651:2, V *8*

MISCELLANEOUS

Corey C. Watson, *Mootness and the Constitution*, 86 Nw. U. L. Rev. 143 (1991) *9*

Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 05 (1992) *9*

Walter beGruyter, American Council on Education, AMERICAN UNIVERSITIES AND COLLEGES 1033 (14th ed. 1992) *7*

University of New Hampshire, STUDENT RIGHTS, RULES AND RESPONSIBILITIES *3*

U.S. Sup. Ct. R. 13 ..... *4*

N.H. Sup. Ct. R. 7 ..... *4*

U.S.S.G §8, introductory commentary *8*

U.S.S.G. §8C2.5(c) *6*

U.S.S.G. §8C2.5(g) *10*

U.S.S.G. §8C2.5(g) application note 12 ..... *10*

U.S.S.G. §8D *8*

NO. 97-346

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

Zeta Chi Fraternity respectfully replies to the State of New Hampshire's Brief in Opposition, which alleged that this case is moot, and prays that its petition for a writ of certiorari to review the judgment of the New Hampshire Supreme Court in this case be granted.

REPORT OF OPINION BELOW

On May 22, 1997, the New Hampshire Supreme Court rendered an opinion in this case. *State of New Hampshire v. Zeta Chi Fraternity*, 142 N.H. 16, 696 A.2d 530 (1997).

STATEMENT OF FACTS CONCERNING MOOTNESS

In its Brief in Opposition, the State of New Hampshire requests that Zeta Chi Fraternity's Petition for Writ of Certiorari be denied on the grounds that the case is moot. Zeta Chi Fraternity has stated facts rebutting that allegation in affidavits which are reproduced in the appendix to this Reply Brief. The relevant facts concerning the mootness issue are set forth here.

Zeta Chi Fraternity was sentenced to a two-year term of probation which included a provision allowing the police and the probation department to conduct unannounced searches of the fraternity's premises. On at least two occasions, searches were conducted pursuant to the probation condition. Nelson Aff., *Appendix* at 1; Moore Aff., *Appendix* at 3. In one instance, a brother was too scared to return to his fraternity for two months. Nelson Aff., *Appendix* at 1.

As a result of the searches, prospective members were too wary of the fraternity to join. DiScipio Aff., *Appendix* at 6. Some prospective members, who had completed the application procedures and been accepted into the fraternity, declined membership. Moore Aff., *Appendix* at 3. Individuals who where not associated with the crime were subject to warrantless searches.

Moreover, the fraternity suffered a significant drop-off in the number of people interested in joining. Before the fraternity's sentence, it enjoyed between 11 and 19 new member pledges during the fall semester, and between 6 and 11 in the spring. In the fall of its conviction, however, the fraternity got just 8, and then only 4 in the spring. In 1995, the fraternity enjoyed just 9 pledges in the fall and none in the spring. Boulanger Aff., *Appendix* at 8.

Because of this decline, the fraternity suffered financially. It lost membership dues it would have otherwise collected, and can

expect perpetually diminished revenue from the reduced stream of alumni contributions.

Also, the fraternity lost its recognition as an official University of New Hampshire (UNH) organization, and cannot easily regain it. Such status confers the ability to use UNH's name, apply for funding and office space, be listed in UNH publications and get reduced-fee advertising in them, sponsor official programs, use various UNH advertising resources, participate in an annual activities fair, receive mail at the University, and other benefits. University of New Hampshire, STUDENT RIGHTS, RULES AND RESPONSIBILITIES 7-15 (1997) (*Student Code of Conduct*, describing sanctions for students and organizations convicted of crimes); *id.* at 54-56 (*Academic Policies* §18, describing policies under which organizations gain recognition by UNH and benefits thereof).

REASONS CASE IS NOT MOOT

The State of New Hampshire alleges in its Brief in Opposition that Zeta Chi Fraternity's Petition for Writ of Certiorari is moot. Although Zeta Chi's sentence has been served, and probation has lapsed, the case is not moot. *Sibron v. New York*, 392 U.S. 40, 51 (1968) ("mere release of the prisoner does not mechanically foreclose consideration of the merits by this Court").

I. Zeta Chi was Diligent in Prosecuting its Appeal

Sibron v. New York created two exceptions to the mootness doctrine in criminal cases where the defendant's sentence has been served. Under the first exception, a case is not moot when, despite the defendant's diligent prosecution of the appeal, because of inherent delays in the justice system the case could not reach this Court before the expiration of the sentence. This mootness exception was reiterated in *Street v. New York*, 394

U.S. 576 (1969). In *St. Pierre v. United States*, 319 U.S. 41, 43 (1943), this Court stated that the case was moot, in part, because "[i]t does not appear that petitioner could not have brought his case to this Court for review before the expiration of his sentence."

In the current case, Zeta Chi Fraternity was diligent in prosecuting its case. It appealed to the New Hampshire Supreme Court within 30 days of its sentencing, pursuant to New Hampshire court rules. N.H. Sup. Ct. R. 7. It filed its brief within the time ordered by the court, never asked for an extension of time, and appeared at oral argument at the time ordered by the court. Within 90 days of the New Hampshire Supreme Court's opinion, Zeta Chi filed its Petition for Writ of Certiorari with this Court. U.S. Sup. Ct. R. 13.

Thus, the fraternity diligently prosecuted its appeal, and created no delays. The process could not have been made quicker. The case did not reach this Court before the expiration of the fraternity's sentence because of the inherent delays built into the justice system, and not because of any fault by the petitioner. This case therefore comes under the *Sibron* exception, and the merits should be reached.

II. The Sentence has Collateral Consequences

Sibron's "second exception . . . permits adjudication of the merits of a criminal case where under either state or federal law further penalties or disabilities can be imposed . . . as a result of the judgment which has . . . been satisfied." *Sibron v. New York*, 392 U.S. at 53-54 (quotations omitted). At one time, this Court required a showing of collateral consequences in all cases. *St. Pierre v. United States*, 319 U.S. at 42-43. This Court has since announced a presumption of collateral consequences when the defendant appeals a conviction. *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Fiswick v. United States*, 329 U.S. 211 (1946);

United States v. Morgan, 346 U.S. 502 (1954). But on appeal of the sentence only, and not the underlying conviction, the defendant must allege consequences. *Lane v. Williams*, 455 U.S. 624 (1982). The collateral effects alleged may be potential, remote, or speculative, *Ginsberg v. New York*, 390 U.S. 629, 633-34 n. 2, (1968), *reh'g denied*, 391 U.S. 971, and need not be confined to legal consequences. *Street v. New York*, 394 U.S. at 580 n.3; *Carafas*, 391 U.S. at 237.

For mootness purposes, an appeal of a sentence alone carries with it all the collateral consequences created by the underlying conviction. *Pollard v. United States*, 352 U.S. 354 (1957). In *Pollard*, the defendant appealed to this Court the legality of his sentence, but did not attack the underlying conviction. This Court found that because a sentence cannot exist without its underlying conviction, the collateral consequences resulting from the conviction defeat a mootness claim even when the sentence alone is being appealed. *Id.* 352 U.S. at 358.

> "In *Pollard v. United States*, the question was raised as to whether or not the case was moot because the petitioner had been released from prison after his petition for certiorari had been granted. The issue presented was not that of guilt, but instead one that related only to the propriety or legality of the sentence imposed. We said 'The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits.' Though we divided on the merits, we were unanimous on that point."

Wetzel v. Ohio, 371 U.S. 62, 65 (1962) (citations omitted). *See North Carolina v. Rice*, 404 U.S. 244 (1971) (remanded for findings on mootness issue).

Zeta Chi Fraternity has suffered collateral consequences as a result of the probation search provision, which alone is being

appealed, and of the underlying conviction. Because of the search condition, the Fraternity lost members and failed to attract new ones. The Fraternity therefore lost revenue and lost the continuing stream of revenue from future alumni which it could have expected had the random search condition not been imposed.

Because of the convictions, the fraternity lost its status as an organization recognized by UNH, and cannot easily regain it in the future. Also, the conviction can be used against Zeta Chi Fraternity in the future in the same manner as a prior conviction can be used against any defendant for such purposes as elevating penalties or attacking credibility. *See, e.g., Fiswick v. United States*, 329 U.S. at 211; *United States v. Morgan*, 346 U.S. at 502; *Ginsberg v. New York*, 390 U.S. at 629. *See also*, U.S.S.G. §8C2.5(c) (elevation of sentence based on prior criminal history).

III. This Case is Capable of Repetition Yet Evading Review

This Court has allowed moot cases to be considered when they are capable of repetition yet evading review. This exception to the mootness doctrine applies when the action complained of is short in duration. *See, e.g., Southern Pac. Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911) (short-term orders); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (5 years short enough duration). In the present case, the probation lasted just two years, a duration demonstrably short enough that it lapsed before the case reached this Court.

There must also be a reasonable expectation that the same party will suffer the same harm. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Honig v. Doe*, 484 U.S. 305, 319 (1988); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980) (party"faces some likelihood of becoming involved in same controversy in the future"); *Burlington N. R. Co. v. Maintenance of Way Employees*, 481 U.S. 429, 436 n.4 (1987) (parties

"reasonably likely" to find themselves in future dispute). This Court has allowed the exception to apply even when it is speculative that the identical parties will be involved in the future dispute. *Meyer v. Grant*, 486 U.S. 414 (1988) (assuming same organization would attempt to place same question on ballot in subsequent election); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466 (1991) (assuming that same person would seek to be candidate for labor union post); *Roe v. Wade*, 410 U.S. 113, 125 (1973) (assuming same women would have unwanted pregnancy and would seek abortion). This Court has been less generous with the exception when the party can avoid the injury by abiding the law. *Honig v. Doe*, 484 U.S. at 320 ("for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury") *citing Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Murphy v. Hunt*, 455 U.S. 478 (1982); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

However, given the prevalence of drinking on college campuses, and that the vast majority of UNH students are under New Hampshire's legal drinking age of 21,[1] it is likely that this fraternity, or some other, will be found guilty of underage drinking. Moreover, upon conviction, it is likely that probation with a unwarranted search condition will again be imposed. For organizations convicted of crimes, incarceration is of course not an option. To enforce a sentence, probation with a search condition is one of the few ways criminal courts can maintain

---

[1]71% of UNH students are between 17 and 21 years old. Walter beGruyter, American Council on Education, AMERICAN UNIVERSITIES AND COLLEGES 1033 (14th ed. 1992).

supervision and control of what exists and occurs on an organization's premises. U.S.S.G. §8, introductory commentary ("probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented"); U.S.S.G. §8D (organizational probation); N.H. Rev. Stat. Ann. § 504-A:1 *et seq.*; N.H. Rev. Stat. Ann § 651:2, V.

IV. Mootness Standards are Relaxed When Constitutional Violations are Alleged

Mootness is closely related to standing. Mootness is "the doctrine of standing in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Geraghty*, 445 U.S. 388 at 397 (quotation omitted).

Standing generally requires that a party has sustained or is in immediate danger of sustaining a direct injury as a result of the action. However, standing is relaxed when constitutional issues are raised. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private litigant may raise equal protection claim of excluded juror). Standing requirements are particularly relaxed when first amendment issues are present. *See, e.g., Maryland v. Munson Co.*, 467 U.S. 947 (1984); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Zeta Chi Fraternity's rights to associate were chilled by the probation search condition. Several people understandably refused to join the fraternity, and some brothers considered leaving. One brother refused to return for two months.

Because of the constitutional rights to associate that this case touches, justiciability doctrines, including mootness, should be relaxed. Moreover, the government should not be permitted to violate citizens' rights, and then to stand behind the procedural device of mootness to avoid review of its actions.

V. This Case Presents a Unique Opportunity to Address Unresolved Issues of Mootness Law and of Organizational Sentencing

This Court has recognized that its Article III jurisprudence is "riddled with exceptions" motivated by "practicalities and prudential considerations." *Geraghty*, 445 U.S. at 406 n.11. This case presents this Court with an opportunity to revisit whether mootness is a constitutional issue, particularly in the criminal context.

In *Honig v. Doe*, 484 U.S. 305 (1988), this Court explored the several theoretical underpinnings of mootness, Corey C. Watson, *Mootness and the Constitution*, 86 NW. U. L. REV. 143 (1991), but left the matter unresolved. There is substantial precedential and historical authority to abandon article III's constitutional limitations on justiciability. *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring); Evan T'sen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 05 (1992).

Without a "case and controversy" limitation, this Court may easily accept this case to determine the merits raised in Zeta Chi Fraternity's Petition for Certiorari , which are also important and unresolved.

Moreover, as the State of New Hampshire points out "[t]he petitioner is a corporation and the issues surrounding the search of a corporate premises may differ from those involved in the search of an individual." *Brief in Opposition* at 8. In this case, people who were not members of the organization nor present at the time of the crime were subject to searches without cause. In addition, organizational crimes are not often litigated to finality, especially in light of the incentives built into the federal sentencing guidelines which encourage corporate defendants to escape liability by attributing responsibility to individuals. *See,*

e.g., U.S.S.G. §8C2.5(g) and §8C2.5(g) application note 12 (reduction of sentence for reporting culpable individuals). This case thus presents an opportunity to determine the conditions under which organizations are sentenced.

CONCLUSION

The law concerning whether a probation search must be justified by individualized suspicion is currently chaotic and should be resolved by this Court. Moreover, the State should not be allowed to violate individuals' and organizations' rights against warrantless searches, and then to claim that the matter is non-justiciable on the grounds of delays inherent in the justice system. For the foregoing reasons the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Joshua L. Gordon
(Counsel of Record)
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

J. P. Nadeau
Nadeau Prof. Office
507 State St.
Portsmouth, NH 03801
(603) 436-0110

NO. 97-346

In The

Supreme Court of the United States

OCTOBER TERM, 1997

ZETA CHI FRATERNITY,

Petitioner,

v.

STATE OF NEW HAMPSHIRE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

REPLY TO BRIEF IN OPPOSITION

APPENDIX

Affidavit of Michael P. Nelson *A1*

Affidavit of Jeffrey T. Moore *A3*

Affidavit of Michael J. DiScipio *A6*

Affidavit of Todd A. Boulanger *A8*

University of New Hampshire, STUDENT RIGHTS, RULES AND RESPONSIBILITIES 7-15 (1997) .....
..... *Due to length, publication submitted separately*

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

AFFIDAVIT

I, the undersigned, after being duly sworn, depose and state as follows:

1. I have personal knowledge of all statements set forth herein and they are true to my best knowledge and belief;

2.

During the UNH Homecoming of 1996, Sgt. Kelly, of the Durham Police Department, proceeded to enter, without being invited by any member of the fraternity, the front entrance and kitchen area of the Zeta Chi Fraternity. Upon his entrance, he then proceeded to instruct everyone in the area to leave the house immediately. When he turned to me and asked me to leave, I informed him that I was a brother of Zeta Chi. I also informed him that I lived a great distance away and that I was staying at the house for the weekend. However, even after hearing my pleas, Sgt. Kelly forced me to leave the house and instructed me not to return unless I wanted to be arrested.

With no place to go, I headed to the nearest resident hall and snuck into the lounge. There I spent the night on the floor until an R.A. kicked me out. At this point, it was close to sunrise. I proceeded to retrieve my car from the Zeta Chi parking lot and headed directly home. I did not return to the Zeta Chi house for over two months due to my lingering fear that the above mentioned incident would be repeated.

Michael P. Nelson

Michael P. Nelson

October 29, 1997

PERSONALLY APPEARED the above named, Michael P. Nelson, and gave oath that the foregoing subscribed to by him is true to his best knowledge and belief, Before Me:

Notary Public / Justice of Peace
Commission Expires: 4/14/98

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

AFFIDAVIT

I, the undersigned Jeff Moore, of 328 F. Street NE, Washington DC, 20002, after being duly sworn, state as follows:

1) I was an active member of Zeta Chi fraternity from September of 1992 until May of 1996 when I graduated from the University of New Hampshire. I was Secretary of the fraternity from December of 1993 until December of 1994, and worked extensively with our attorney's during our trial. After my term as Secretary was over, I continued to assist the new officers with court proceedings and decision making. On Saturday, March 30, 1996, during the time of Zeta Chi's Probation, the Durham Police Department (DPD) arrived at the Zeta Chi Fraternity around 10:00 pm, without our probation officer. They had heard rumors that ZX was having a function that night and had hoped to come and break it up. These rumors proved to be false and there was nothing going on at the fraternity that warranted their attention. It is safe to say the Durham Police were quite irritated that there was no party of be dispersed. At this point in time, I was entertaining a few friends and prospective members in my private room that was located on the second floor of the fraternity. Once in the outer door of the building, they heard music and voices coming from my room in the fraternity house. The officers proceeded to knock on my door and demanded they be allowed in. My roommate at the time, Craig Simpson, stepped outside our apartment to speak with the officers. I was in my bedroom and some of my friends who were in the apartment informed me that he was talking to the police. Having been involved in the fraternities legal matters from the beginning and knowing the details of our probation, I thought it would be a good idea to see what the officers wanted.

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S Sup Ct. No. 97-346

AFFIDAVIT

When I stepped outside, I was immediately confronted by the officers. One Junior Officer shouted immediately at me, "What the fuck do you want? This doesn't concern you.". I explained to him that Craig was my roommate and I wanted to make sure that there wasn't any problem. At this point the Captain of the Police Force, Captain McGann, told me he knew we had people in our room and our recent sentence allowed him to search my room. I was firm in stating to him that my room was not a common area, and that the court order did not allow him to search it. This statement only served to further infuriate the already aggressive officers and they continued their threats. I was told that if I didn't let them search my room, that I would be brought down to the station and that they would get Craig and myself "thrown out of school" I continued to stress to them that they were not allowed to search my room and that there was nothing legally they could do to me or my education for not allowing them into my private room. This argument ended with a few threats that they would be back and that they would get me for some other violation.

Having dealt with the Durham Police on several occasions during the previous two years, their threats and heavy-handed tactics were not new to me. However, my roommates, the prospective members and guests in my apartment were visibly shaken by this incident. My roommate, considered leaving the fraternity and moving into an apartment away from the fraternity. He did not want to deal with the constant harassment from the DPD and possibility of being search or even detained for no reason at all. After much lobbying, discussions with his family and on the strength of our friendship, I convinced him that he should stay and that the police could not do anything to violate his rights. Unfortunately, I did not have as much luck with the prospective members. Two young men, both named Chris (I will be happy to give their full names if requested) where actually invited to join the Zeta Chi Fraternity, accepted and then quit because of the harassment by the DPD. I tried to convince them that the DPD could not search private living areas and that people like myself knew the parameters

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No 97-346

AFFIDAVIT

of our sentence and would not allow our rights to be violated. However, this argument was not strong enough and these two men decided not to join the Zeta Chi.

2) I believe the story above give examples of brothers of ZX living in fear of the DPD and invasions of their privacy, not to mention the fear experienced by the guests of members living in the fraternity. I personally feared that I would actually be detained for not allowing them to search my room. On several occasions, myself, Dave Flanders and Justin Sprinzen, had confrontations with the DPD where we were threatened with arrest if we did not comply with their illegal wishes. Many times, I would have to argue and even defy my parents wishes to continue to live at ZX. Only my love of fraternity, and understanding of my personal rights, allowed me not only to live in such a hostile and unstable environment, but to excel in my schoolwork and professional pursuits.

Dated: October 30, 1997

Jeffrey T. Moore

State of: New Hampshire
County of: Strafford

PERSONALLY APPEARED the above named Jeffrey T. Moore and made oath that the foregoing subscribe to by his is true to his best knowledge and belief, before me:

Notary Public/Justice of Peace
Commission Expires: October 18, 2000

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

AFFIDAVIT

I, the undersigned, after being duly sworn, depose and state as follows:

1. I have personal knowledge of all statements set forth herein and they are true to my best knowledge and belief;

2. In September of 1997, a promising young man came to our fraternity house. Ted Neumann hung out with us every day and night. He earned a bid, began pledging, and was my fraternal little brother. About two weeks into pledging Ted got a minor violation and was forced to meet with the notorious Captain McGann of the Durham police department.

He returned to the fraternity house, and was noticeably upset. He told me that Captain McGann had forbidden him to continue pledging. He then said that Zeta Chi brothers were "social bandits" and do not belong in school. He continued to threaten Ted, McGann told him that he would hold random searches of the fraternity, and if Ted was here he would be kicked out of school. Not only were we off probation at this point, but the New Hampshire Supreme Court had already ruled against such searches.

I explained to Ted that these searches could not happen, and that even if they could McGann had no business telling Ted what off campus locations he could hang out in. Two days later, Ted Neumann terminated his pledge status in Zeta Chi Fraternity. His reason was "I can't deal with this right now, and if I get kicked out of school my parents will kill me".

Since that day Ted has not come back to the house. We lost a good friend, a potential brother, and Captain McGann cost a student at The University Of New Hampshire a wonderful opportunity.

Michael James DiScipio

Michael James DiScipio
President Zeta Chi Fraternity

October 29, 1997

PERSONALLY APPEARED the above named, Michael James DiScipio, and gave oath that the foregoing subscribed to by him is true to his best knowledge and belief, Before Me:

Notary Public / Justice of Peace
Commission Expires: 4/4/98

Supreme Court of the United States

ZETA CHI FRATERNITY

v.

STATE OF NEW HAMPSHIRE

U.S. Sup. Ct. No. 97-346

November 12, 1997

AFFIDAVIT

1.) I, Todd Boulanger of Washington, D.C. was an active Zeta Chi Fraternity brother from 1993-1995. During that time period I presided as vice-president of the organization from the spring of 1993, to the fall of 1994. Since the spring of 1996, I have acted as the organization's alumni advisor.

2.) On average, a fall semester would yield anywhere from 11-19 pledges. Immediately following the sentence, we received eight. The spring semester typically yields between 6-11. Following the sentence, we received four. In 1995, I believe we received nine pledges in the fall and had no pledges in the spring. In 1995, we had 54 active members--meaning that they were members participating financially in the organization. Today, excluding current pledges, there are 24 active members of the Fraternity. Unfortunately, Zeta Chi has suffered and continues to suffer financial loss and hardship due to the specifics of our probation.

State of New Hampshire
County of Strafford

Todd A. Boulanger

PERSONALLY APPEARED the above named Todd A. Boulanger and made oath that the foregoing subscribe to be his is true to his best knowledge and belief, before me.

Notary Public
Justice of Peace
Expires October 18, 2000